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# Constructing Issue Classes

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CONSTRUCTING ISSUE CLASSES

*Elizabeth Chamblee Burch\**

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## INTRODUCTION

CLASS actions are no longer functional. In 1966, the Advisory Committee on Civil Rules embarked on a guarded experiment by anticipating how class actions might help enforce substantive laws. But in the years since, both Congress and the courts have twisted and curtailed that experiment through increasingly strict certification standards. Now plaintiffs' attorneys forgo a bevy of claims to buttress their certification argument, bootstrap state law claims into federal causes of action, or bill class-certification questions at such high levels of generality that judges are confronted with an all-or-nothing proposition: to certify, or not. But these strict standards and corresponding tactics have evolved from a misguided focus on class members' cohesiveness vis-à-vis one another and a failure by parties and courts alike to frame and adjudicate collectively what actually unites plaintiffs—a defendant's conduct.

This black-or-white thinking is not without consequence. Without certification, some litigation—like small-stakes consumer claims—will evaporate, which undermines enforcement goals. While economically viable claims will not wholly disappear, most injured people will not sue, which raises questions about realizing compensation and deterrence aims. And plaintiffs' attorneys' strategy of presenting only potentially certifiable causes of action can simultaneously risk disabling viable personal-injury claims and saddling subsequent proceedings with unpredictable preclusion. Plaintiffs who do sue individually are likely to be corralled into multidistrict litigation, where judges face similar agency problems but lack clear policing authority absent class certification.<sup>1</sup>

Certifying fewer classes also seemingly correlates with increased public regulation through state attorneys' *parens patriae* power. While faithful attorneys general can fill a much maligned regulatory void,<sup>2</sup> as the *New York Times* recently reported, they can also be purchased with timely campaign contributions.<sup>3</sup> Moreover, when state attorneys proceed exclusively in state court, *parens patriae* actions incite further concerns about inconsistent outcomes, precluding private claims, and inadequately representing constituents.

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<sup>1</sup> Without certifying a class, multidistrict litigation judges lack clear authority to award attorneys' fees, ensure adequate representation, or approve settlements. See Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. Rev. 115, 117–18 (2015).

<sup>2</sup> Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. Chi. L. Rev. 623, 661–68 (2012).

<sup>3</sup> Eric Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, N.Y. Times, Oct. 29, 2014, at A1.

Issue classes, where courts certify only certain claims or elements within those claims, can shed conventional black-or-white thinking about certification, equip private regulators with a procedural means to stymie these concerns, and advance substantive values. But issue classes palliate these pitfalls only insofar as judges abandon their misguided search for internal class unity and recognize that the defendant's conduct, when uniform, is what bonds plaintiffs—not race, gender, identical injuries, or consistent damages.

Reorienting traditional philosophies about class cohesion frees judges to think pragmatically about how to situate, sort, and adjudicate the components of claims and defenses by classifying them into their constituent parts. Most legal elements can be cataloged according to whether they address a defendant's alleged conduct or a plaintiff's eligibility for relief. When a defendant's conduct is nonindividuated toward plaintiffs or when substantive law permits plaintiffs to satisfy their eligibility for relief with aggregate proof, those components are ripe for aggregate treatment. Adjudicating those issues collectively may substantially advance all the claims, increase efficiency by reducing replicated proof, and minimize inconsistent verdicts.

The promise of issue classes has not gone unnoticed.<sup>4</sup> After a rocky debut in the 1990s with appellate decisions in *Castano v. American Tobacco Co.*<sup>5</sup> and *In re Rhone-Poulenc Rorer, Inc.*,<sup>6</sup> issue classes are now experiencing a renaissance: They top the Rule 23 subcommittee's agenda for potential rule changes and have been embraced by most circuit courts.<sup>7</sup>

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<sup>4</sup> For example, the Bureau of National Affairs recently ran a "Special Report" featuring this author's views. Perry Cooper, Issue Classes Swell in Consumer Suits: Are Potential Rewards Worth the Risk?, *Class Action Litig. Rep.* (BNA) 68 (Feb. 13, 2015).

<sup>5</sup> 84 F.3d 734, 747–49 (5th Cir. 1996).

<sup>6</sup> 51 F.3d 1293, 1300–01 (7th Cir. 1995).

<sup>7</sup> Honorable Robert M. Dow, Jr. et al., "Weigh in Early." A Town Hall Meeting with the Rule 23 Subcommittee of the Advisory Committee on Civil Rules (Oct. 23, 2014), [http://shop.americanbar.org/PersonifyImages/ProductFiles/211246/CEN4CAC\\_WebBrochure2.pdf](http://shop.americanbar.org/PersonifyImages/ProductFiles/211246/CEN4CAC_WebBrochure2.pdf). Thus far, the subcommittee's recognition of the emerging consensus and proposal for allowing appellate review largely follow this Article's recommendations, and I am grateful to several subcommittee members for taking the time to talk with me and for soliciting diverse views from wide-ranging audiences on multiple occasions. Advisory Committee on Rules of Civil Procedure, Agenda Book 281–83 (2015), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2015-04.pdf>. Even circuits with initial reluctance have revisited the issue. E.g., *In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599, 602–03 (7th Cir. 2014); *In re Deepwater Horizon*, 739 F.3d 790, 804 (5th Cir. 2014); see also *infra* Subsection III.A.1 (discussing circuit court opinions).

To date, however, scholars have done little beyond debating whether issue classes should exist.<sup>8</sup>

This Article changes the status quo with two principal contributions. First, after identifying how our existing procedural landscape fails to effectively redress nationwide misconduct, it constructs a unifying doctrinal theory as to when collectively resolving a single issue will be worthwhile. By reconsidering disjointed notions of class cohesion and recasting claims and defenses into defendant's conduct or plaintiff's eligibility components, it demystifies the certification calculus and sets the stage for courts to certify classes that resolve key issues like a defendant's uniform conduct. This resists the all-or-nothing approach to certification and coordinates the judicial response to jurisdictionally disaggregated regulators. Second, it offers solutions to a medley of sticky legal and logistical quandaries such as how to compensate issue-class counsel when no common fund exists, ensure appropriate error-correction mechanisms through interlocutory appeals, coordinate fragmented public and private regulators, remand multidistrict litigation cases post-issue-classes, and confront Seventh Amendment Reexamination Clause concerns.

Part I begins by identifying and defining the central problem of today's regulatory terrain: When a national corporation behaves egregiously, that single act or series of acts gets distorted through several legal prisms—jurisdictional restrictions, state law intricacies, and limited regulatory authority. Unless there is parity between the regulator's authority, the governing law, the court's jurisdiction, and the corporation's nationwide conduct, the net effect is to thwart coordinated enforcement. Defendants successfully capitalize on these imbalances to avoid class certification, at least until they want the umbrella of closure that settlement classes provide. But this prompts settlement-oriented litigation.

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<sup>8</sup> Compare Laura J. Hines, *The Unruly Class Action*, 82 *Geo. Wash. L. Rev.* 718, 721, 723–24 (2014) (arguing, in part, that rule changes must occur before courts can implement issue classes), and Mark A. Perry, *Issue Certification Under Rule 23(c)(4): A Reappraisal*, 62 *DePaul L. Rev.* 733, 735–40 (2013) (arguing against using issue classes), with Patricia Bronte et al., "Carving at the Joint": The Precise Function of Rule 23(c)(4), 62 *DePaul L. Rev.* 745, 746–47 (2013) (positing that circuits splits on issue classes are resolving in favor of their use), 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, 285–90 (suggesting that Rule 23's predominance analysis should accommodate issue certification), and Jenna C. Smith, "Carving at the Joints": Using Issue Classes to Reframe Consumer Class Actions, 88 *Wash. L. Rev.* 1187, 1206–14 (2013) (analyzing cases to advocate using issue classes for consumer claims).

Plaintiffs' attorneys sacrifice valuable claims to satisfy strict certification standards, have little bargaining leverage with defendants, and rarely test the claims' merits. This risks undervaluing claims, undermining deterrence, and encouraging splintered enforcement, which escalates inadequate-representation concerns and prompts erratic preclusion decisions.

Class certification, adequate representation, and preclusion all boil down to whether a class is cohesive—a term that appears nowhere in Rule 23, but has emerged at the heart of Supreme Court jurisprudence. Part II irons out doctrinal difficulties with class cohesion and situates defendant's conduct as what unifies plaintiffs. When misconduct toward plaintiffs is uniform, adjudicating conduct components collectively promotes consistency. But this also reveals a fundamental flaw when plaintiffs' attorneys try to transform decentralized conduct toward different individuals into a group wrong by deploying "aggregate proof" through statistical or economic experts. Without a change in substantive law, the magic of mathematical models is just smoke and mirrors—models cannot make disparate conduct uniform.

Part III recognizes that, as usual, the devil is in the details. It thus breaks new ground by carefully parsing interrelated doctrinal, political, logistical, and constitutional concerns about issue classes. While issue classes can promote resource parity between parties and reduce inconsistent decisions as to the same conduct, certifying inconsequential issues can generate undue settlement pressure. Yet, certifying only components that resolve core questions and instituting appeals on the merits can alleviate this pressure. Conversely, without appropriate incentives, issue classes could lie stillborn in the hands of plaintiffs' attorneys: Because issue classes do not produce a final judgment, there may be no common fund from which to collect fees. Adapting charging liens and the common-benefit doctrine, however, ensures compensation for class counsel if plaintiffs subsequently benefit from the issue class's preclusive effect.

To be sure, issue classes can do only so much. Multiple regulators persist and procedural mechanisms cannot alter regulatory and jurisdictional overlap. But, because issue classes work by precluding re-litigation in follow-on proceedings, they can facilitate cross-pollination between (and consistency among) public and private enforcers in dispersed fora. Likewise, they offer a means for transferee judges to resolve

common conduct questions in multidistrict litigation when plenary classes are nonviable.

### I. REFRACTING UNIFORM MISCONDUCT

Most businesses outgrew jurisdictional limits long ago. Nationwide conduct and conflicting state laws thus make it increasingly challenging for nonfederal entities like state attorneys general and private citizens to hold companies accountable for the full scope of any wrongdoing. When something goes awry with a product marketed nationwide, a mismatch occurs unless the regulator's authority, the applicable substantive law, and the court's jurisdiction all mirror the impact of defendant's misconduct. When they do align, a regulator with full resources can address wrongs appropriately. But parity between the regulator and the regulated is rare. Thus, suits concerning the same alleged wrongdoing are scattered in state and federal courts throughout the country, making effective, predictable enforcement challenging. Accordingly, this Part begins by labeling and defining this prism effect, and then explores its impact on regulatory coordination, efficient resource use, substantive enforcement of rights, and consistent outcomes.

#### *A. The Prism Effect: Distorting Defendant's Conduct*

To illustrate the prism effect, consider a simple example: An engineer testing car safety finds a defect that can cause the vehicle to suddenly accelerate without the driver's prompting. Important decisions follow such as whether the engineer properly reports the incident; how far up the chain of command that report goes; whether the engineering department communicates with the legal department; and whether the company issues an immediate recall or blames driver error.<sup>9</sup> While the company's size and the number of affected people complicate these elementary questions, judges and juries routinely resolve issues like these every day. But the bigger the company and the larger its geographic reach, the more likely it is that these relatively straightforward conduct questions are ad-

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<sup>9</sup> In the Toyota acceleration litigation, Toyota initially blamed floor mats and trapped gas pedals for the problem when the root cause was a sticky gas pedal caused by plastic material inside the pedal. Danielle Douglas & Michael A. Fletcher, *Toyota Reaches \$1.2 Billion Settlement to End Probe of Accelerator Problems*, Wash. Post (Mar. 19, 2014), [http://www.washingtonpost.com/business/economy/toyota-reaches-12-billion-settlement-to-end-criminal-probe/2014/03/19/5738a3c4-af69-11e3-9627-c65021d6d572\\_story.html](http://www.washingtonpost.com/business/economy/toyota-reaches-12-billion-settlement-to-end-criminal-probe/2014/03/19/5738a3c4-af69-11e3-9627-c65021d6d572_story.html).

judicated ineffectively. As prisms distort light, the limits of a regulator's authority, the boundaries of a court's jurisdictional reach, and the divergences among state laws refract defendant's uniform conduct, adding to the regulatory complexity.

Without parity between a regulator's power and the defendant's nationwide conduct, enforcement can be fragmented and disjointed. For example, in the Toyota sudden-acceleration cases, multiple private attorneys filed class-action complaints before the recall,<sup>10</sup> twenty-nine states' attorneys general sued after the recall,<sup>11</sup> and the U.S. Department of Justice fined the company \$1.2 billion.<sup>12</sup> But each entity's regulatory scope differed dramatically: The Department of Justice's reach mirrored Toyota's nationwide sales as might a nationwide class action, but statewide classes and state attorneys general could govern Toyota's conduct only insofar as it impacted a particular state.

Most public and private litigants are constrained by a court's jurisdiction and their own regulatory authority.<sup>13</sup> In *parens patriae* actions, a state attorney general can sue only on behalf of her state and its citizens. State attorneys' status as public actors who involve only a single state's law allows them to circumvent some of the procedural uncertainties that Rule 23 presents.<sup>14</sup> But, unless all state attorneys enter the fray—and only twenty-nine did so in the Toyota sudden-acceleration cases<sup>15</sup>—they cannot fully redress defendant's past conduct even though they might negotiate for broad injunctive relief that affects future conduct uniformly.

Likewise, in individual suits, most people prefer not to sue and those who do may find that their claim is not worth an attorney's investment.<sup>16</sup> Joinder and multidistrict litigation recalibrate the cost imbalance in part

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<sup>10</sup> Nancy J. Moore et al., *Class Actions Against Toyota Mount as Nationwide, State Suits Are Filed*, *Class Action Litig. Rep. (BNA)* 147 (Feb. 26, 2010).

<sup>11</sup> Chris Woodyard, *Toyota Recall Nightmare Results in Deal with 29 States*, *USA Today* (Feb. 14, 2013), <http://www.usatoday.com/story/money/cars/2013/02/14/toyota-recalls-attorney-general-settlement/1919883/>.

<sup>12</sup> Douglas & Fletcher, *supra* note 9.

<sup>13</sup> See, e.g., Samuel Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 *Tex. Int'l L.J.* 135, 137 (1999) (discussing limited jurisdiction).

<sup>14</sup> But some courts have required individual proof, subjecting them to a shadow Rule 23 standard. See *infra* note 34 and accompanying text.

<sup>15</sup> Woodyard, *supra* note 11.

<sup>16</sup> See Shawn J. Bayern, *Explaining the American Norm Against Litigation*, 93 *Calif. L. Rev.* 1697, 1702 (2005) (using mathematical models and sociological research to support the notion that most injured persons do not sue).

by pooling claims and placing the onus of funding and developing common discovery on the plaintiffs' steering committee. But when individual claims arise from disparate states' laws and the transferee judge has authority over pretrial procedures only, feasibility problems persist. The only way to resolve cases collectively is to settle—not adjudicate. Multidistrict litigation thus suffers from an additional mismatch between transferee judges' limited decisional authority and the scope of behavior they attempt to regulate.

The Class Action Fairness Act ("CAFA") exacerbated the prism effect by making putative classes removable, even where state law provides the decisional rules. When multiple states' laws apply to a nationwide class, transferee judges are at a loss: Certifying a class action seems unmanageable, they are not the foremost authority on other states' laws,<sup>17</sup> and yet they face tremendous pressure to resolve the litigation.<sup>18</sup> Absent remanding cases to their transferor courts, which transferee judges loathe doing, their jurisdictional limits constrain private attorneys' ability to credibly threaten a trial and make multidistrict litigation an ill-suited means to regulate nationwide misconduct.

As multidistrict litigation illustrates, substantive law and remedial relief can further refract the defendant's uniform behavior. When nationwide classes arise out of state law, the class's scope may mirror the defendant's conduct, but the choice-of-law problem injects a wrinkle that can render classes unmanageable and thus uncertifiable in federal court. To be sure, the problem is not with states adopting their own laws, which is a central feature of federalism, but in assuming laws' differences without examining whether each defines core elements of a defendant's wrongdoing in similar terms. Put simply, when many states' laws govern, there is no single body of law that is coterminous with defendant's conduct, but there may be similarities among those laws that

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<sup>17</sup> *In re Activated Carbon-Based Clothing Mktg. & Sales Practices Litig.*, 840 F. Supp. 2d 1193, 1199 (D. Minn. 2012) ("[T]he transferor courts, each of which is familiar with the state law of their respective jurisdictions, are in a better position to assess' these claims." (quoting *In re Light Cigarettes Mktg. Sales Practices Litig.*, 832 F. Supp. 2d 74, 77 (D. Me. 2011))).

<sup>18</sup> Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 *La. L. Rev.* 399, 417 (2014) ("[T]he Panel views quickly settling a complex case as a hallmark of success that favorably disposes it to reward that judge with a new assignment."); see also Susan Willett Bird, Note, *The Assignment of Cases to Federal District Court Judges*, 27 *Stan. L. Rev.* 475, 482 n.42 (1975) (reporting that related cases were "assigned specifically to Judge X . . . because he was 'especially able'").

would allow courts to adjudicate conduct uniformly. Yet, unlike declaratory or injunctive relief that targets defendant's actions, determining which plaintiffs are entitled to damages can shift the focus away from the defendant's behavior and toward individual eligibility requirements, often dooming Rule 23(b)(3)'s predominance analysis.<sup>19</sup> So, even though a nationwide class action's regulatory scope theoretically mirrors the defendant's wrongdoing, class actions may fall prey to the prism effect, too, unless they invoke federal law in federal court.

### *B. Exploiting the Mismatch to Fragment Class Actions*

As repeat players, defendants are all too aware of a class action's enforcement power.<sup>20</sup> To undermine class certification, they have steadily amassed a series of victories that exploit imbalances between power and jurisdiction<sup>21</sup> and shift attention away from uniform wrongdoing—even wrongdoing that receives consistent treatment under federal law—and toward diverse plaintiffs.<sup>22</sup> For example, *Wal-Mart Stores, Inc. v. Dukes* strengthened the commonality standard under Rule 23(a) and ensured that defendants could raise individual defenses, which may inject disparate issues into an otherwise cohesive class.<sup>23</sup> What matters now is not whether plaintiffs can raise common *questions*, but whether “a classwide proceeding [can] generate common *answers* apt to drive the resolution of the litigation.”<sup>24</sup> After *Dukes*, defendants have convinced courts to scrutinize the plaintiffs' commonality vis-à-vis one another and have

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<sup>19</sup> See *infra* notes 31–33 and accompanying text (discussing *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013)).

<sup>20</sup> See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *Law & Soc’y Rev.* 95, 100 (1974) (“[Repeat players] can play for rules as well as immediate gains. First, it pays a [repeat player] to expend resources in influencing the making of the relevant rules by such methods as lobbying.”).

<sup>21</sup> E.g., Class Action Fairness Act of 2005 § 2(a), (b), Pub. L. No. 109-2, 119 Stat. 4, 5 (codified in scattered sections of 28 U.S.C.); Private Securities Litigation Reform Act of 1995, S. Rep. No. 104-98, at 4–5.

<sup>22</sup> E.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). Now plaintiffs must prove Rule 23's standards by a preponderance of the evidence and district courts must consider the merits before certifying a class—at least insofar as the merits overlap with Rule 23's requirements. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2414 (2014); *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194–95 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551–52 (2011); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008).

<sup>23</sup> *Dukes*, 131 S. Ct. at 2550–54, 2561.

<sup>24</sup> *Id.* at 2551 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 *N.Y.U. L. Rev.* 97, 132 (2009)).

thereby dodged class certification in toxic-tort cases,<sup>25</sup> environmental-law cases,<sup>26</sup> products-liability cases,<sup>27</sup> breach-of-contract claims,<sup>28</sup> and Truth in Lending Act claims to name but a few.<sup>29</sup>

This logic, that variances among plaintiffs can undermine certification, gained further footing in *Comcast Corp. v. Behrend*.<sup>30</sup> Comcast extended *Dukes*'s "rigorous analysis" standard from Rule 23(b)(2) classes to Rule 23(b)(3) classes and held that plaintiffs' antitrust damages had to be calculable on a class-wide basis.<sup>31</sup> Otherwise, divisible remedies might overwhelm predominance, rendering the class uncertifiable.<sup>32</sup> As the dissenters pointed out, before *Comcast*, courts routinely certified antitrust classes with individual-damage calculations; adjudicating questions about defendants' antitrust-related conduct uniformly saved substantial time and expense.<sup>33</sup>

Given their luck overcoming class actions in federal courts, defendants hoped to expand CAFA's removal jurisdiction to state *parens patriae* actions. When filed in federal courts and consolidated with private claims, some federal judges subjected *parens patriae* litigation to shadow Rule 23 standards and emphasized citizens' individual proof.<sup>34</sup> That

<sup>25</sup> *Henry v. Dow Chem. Co.*, No. 03-47775-NZ, slip op. at 2–5 (Mich. Cir. Ct. July 18, 2011) (pinion and order denying class certification), available at 2011 WL 3269118.

<sup>26</sup> *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 260–62 (3d Cir. 2011) (upholding the district court's refusal to certify CERCLA claims based on contaminated drinking water because plaintiffs could not establish commonality).

<sup>27</sup> See, e.g., *In re Bisphenol-A ("BPA") Polycarbonate Plastic Prods. Liab. Litig.*, 276 F.R.D. 336, 344 (W.D. Mo. 2011) (refusing to certify a class because individualized damage inquiries and plaintiffs' differing knowledge about the BPA controversy undermined commonality).

<sup>28</sup> *Altier v. Worley Catastrophe Response, LLC*, No. 11-241, 2011 WL 3205229, at \*13 (E.D. La. July 26, 2011) (declining to certify claims adjusters' breach-of-employment agreement claims in part because the allegations would require individualized damage determinations).

<sup>29</sup> *Haynes v. Planet Automall, Inc.*, 276 F.R.D. 65, 79 (E.D.N.Y. 2011) (finding that questions concerning whether fees and warranties were part of TILA's finance charge could not "be answered uniformly on a class-wide basis").

<sup>30</sup> 133 S. Ct. 1426, 1433 (2013).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1437 (Ginsburg, J., dissenting) ("Recognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal.").

<sup>34</sup> *In re Zyprexa Prods. Liab. Litig.*, 671 F. Supp. 2d 397, 433–34 (E.D.N.Y. 2009) (reasoning that state claims stand "on the foundation of many thousands of conceptually separate claims"). Judge Fallon's reasoning in the *Vioxx* litigation likewise required individualized proof, noting that the prescribing decision in each doctor-patient relationship differed and that a state would have to prove that each doctor would not have prescribed the drug but for

prompted defendants to claim that state suits were simply class actions in disguise and therefore removable under CAFA. But the Supreme Court's recent ruling in *Mississippi ex rel. Hood v. AU Optronics Corp.* clarified that CAFA's text, which requires class allegations or one hundred or more plaintiffs suing jointly,<sup>35</sup> does not cover *parens patriae* claims involving only a single plaintiff: the state.<sup>36</sup> While this decision constitutes a limited victory for states' attorneys, it can also hinder formal coordination among regulators.

As class actions fragment, so too does enforcement. When regulators have overlapping authority and their power is not coterminous with the impact of a defendant's behavior, multiple regulators will sue in different fora to police the same misconduct. Coordination is ad hoc, at best. Despite some efforts by states' attorneys to create multistate groups,<sup>37</sup> partner with federal agencies,<sup>38</sup> or hire private plaintiffs' attorneys to assist them with *parens patriae* cases,<sup>39</sup> a single question persists: Are these efforts enough to overcome the prism effect and fill enforcement gaps?

Even though newsworthy events can entice attorneys general to sue, for better or worse, private attorneys remain the principal means for enforcing run-of-the-mill substantive rights in areas like employment discrimination, securities fraud, products liability, consumer fraud, anti-trust, and civil rights. But, as courts focus on dissimilarities among plaintiffs and certify fewer class actions, plaintiffs' attorneys are less

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Merck's actions. M. Gabrielle Hils, *Defending Against the Onslaught of State Attorneys General Actions Against Drug Manufacturers: Lessons Learned from Recent Cases*, in *Navigating Drug and Medical Device Legal Issues Leading Lawyers on Handling, Trademark, Fraud, and Liability Concerns* (2014), available at 2014 WL 2355616, at \*12–13.

<sup>35</sup> 28 U.S.C. § 1332(d)(11)(B)(i) (2012).

<sup>36</sup> 134 S. Ct. 736, 743 (2014).

<sup>37</sup> Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 *Colum. L. Rev.* 1998, 2003–04 (2001).

<sup>38</sup> E.g., Press Release, U.S. Dep't of Justice, *Federal Government and State Attorneys General Reach Nearly \$1 Billion Agreement with SunTrust to Address Mortgage Loan Origination As Well As Servicing and Foreclosure Abuses* (June 17, 2014), <http://www.justice.gov/opa/pr/2014/June/14-civ-638.html>.

<sup>39</sup> See, e.g., *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014) (listing private attorney, Jonathan S. Massey, as representing the State of Mississippi); Donald G. Gifford & William L. Reynolds, *The Supreme Court, CAFA, and Parens Patriae Actions: Will It Be Principles or Biases?*, 92 *N.C. L. Rev. Addendum* 1, 3 (2013) (“A *parens patriae* action is filed by the state attorney general, but often with the assistance of private plaintiffs' counsel specializing in mass tort actions.”).

likely to invest their time and resources.<sup>40</sup> Without some change, enforcement gaps may persist and defendants will have no formal means to prevent seriatim litigation, even after winning several cases.

### C. *Fallout from the Prism Effect*

Whether this regulatory magnetism is optimal in terms of compensation and deterrence is a hotly debated normative and empirical question.<sup>41</sup> Yet, one need not wade too far into the substantive debate to appreciate the descriptive point that regulatory layers exist and those layers affect aggregation's procedural goals. Aggregation should not only enable regulators to enforce substantive rights, but encourage efficient resource use, generate binding resolutions, and produce accurate results through trial and settlement.<sup>42</sup> Accordingly, of interest here is how procedural goals are affected by the shift away from plenary class certification and the potential for serial relitigation of common questions.

#### 1. *Settlement-Oriented Litigation*

Increasingly strict certification standards have prompted plaintiffs' attorneys to adopt two principal strategies: winnow the constellation of

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<sup>40</sup> Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. Rev. 1273, 1283–91 (2012).

<sup>41</sup> See, e.g., Todd S. Aagaard, *Regulatory Overlap, Overlapping Legal Fields, and Statutory Discontinuities*, 29 Va. Env'tl. L.J. 237, 286–300 (2011) (claiming that regulatory overlap is an efficient way to ensure against regulatory gaps); Robert B. Ahdieh, *Dialectical Regulation*, 38 Conn. L. Rev. 863, 891–92 (2006) (suggesting that regulatory overlap encourages innovation and overcomes inertia); Lawrence G. Baxter, *Capture Nuances in Financial Regulation*, 47 Wake Forest L. Rev. 537, 539 (2012) (suggesting that regulatory overlap between public and private regulators makes agency capture more difficult); Elizabeth Chamblee Burch, *Securities Class Actions as Pragmatic Ex Post Regulation*, 43 Ga. L. Rev. 63, 88–89 (2008) (arguing that securities class actions provide a public good and that integrating public and private suits diminishes collective action problems, and agency inaction); William W. Buzbee, *Recognizing the Regulatory Commons; A Theory of Regulatory Gaps*, 89 Iowa L. Rev. 1, 5–6 (2003) (expressing concern about under-regulation as a result of agencies with overlapping jurisdiction); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 Harv. L. Rev. 1131, 1138–51 (2012) (arguing that overlapping agency jurisdiction can generate efficiency gains if coordinated); J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 Geo. L.J. 757, 759–80 (2003) (highlighting problems with over-regulation). For an excellent overview of the regulatory and adjectival conceptions of Rule 23, see David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980*, 90 Wash. U. L. Rev. 587, 592–98 (2013).

<sup>42</sup> Principles of the Law of Aggregate Litigation § 1.03 (2010).

claims they seek to certify as a class, and “litigate” with an all-encompassing aim toward settlement—whether as a settlement class action or an aggregate settlement through multidistrict litigation.<sup>43</sup>

The trend toward leaving claims on the table itself has taken at least two forms.<sup>44</sup> First, in employment-discrimination cases, plaintiffs’ attorneys have carved divisible, monetary remedies out of the class action and requested that courts certify indivisible remedies, like declaratory and injunctive relief, under Rule 23(b)(2).<sup>45</sup> Strategically, this not only extricates the individualized questions that accompany divisible relief, but it means that plaintiffs do not automatically receive notice or opt-out rights, and that common questions need not predominate over individual ones.

Second, where defective products like cars cause both personal injuries and economic damages, attorneys sever personal-injury claims through their class definition and complaint.<sup>46</sup> This extracts individualized factual inquiries concerning things like driver error and road conditions from the predominance question while expanding the number of class members. After all, more people will have suffered economic injury from a recalled or defective car’s diminished value than will experience personal injuries. But because economic damages are typically founded in consumer-protection and breach-of-warranty claims, attorneys must convince courts that states’ laws are functionally equivalent lest the choice-of-law question swamp Rule 23(b)(3)’s manageability inquiry.<sup>47</sup>

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<sup>43</sup> Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel’s Transfer Power*, 82 *Tul. L. Rev.* 2245, 2288–89 (2008) (discussing settlement bias in multidistrict litigation).

<sup>44</sup> Before CAFA, the trend was to forgo federal claims so as to avoid removal under federal question jurisdiction. See Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 *Colum. L. Rev.* 717, 748–49 (2005) (“The decision to disclaim any federal grounds for relief can, of course, have a real impact on a plaintiff’s prospects for recovery.”).

<sup>45</sup> Plaintiffs have begun requesting issue class certification as to the Rule 23(b)(2) claims. See, e.g., *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012) (certifying an issue class, noting that some pecuniary relief might be suitable for class treatment, and suggesting that even if not because Merrill Lynch’s brokers earn at least \$100,000 a year, individual claims would be worthwhile to pursue).

<sup>46</sup> See, e.g., *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 720 (5th Cir. 2007) (noting plaintiffs’ request for economic damages, disgorgement, interest, and punitive damages stemming from an air bag recall).

<sup>47</sup> See, e.g., *id.* at 725 (rejecting plaintiffs’ argument that the laws of the fifty-one jurisdictions are “virtually the same”); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices & Prods. Liab. Litig.*, 785 F. Supp. 2d 925, 927 (C.D. Cal. 2011) (denying

Of course, manageability is a problem only if the class is certified for trial.<sup>48</sup> Hence the rise of so-called “settlement class actions,” classes that courts certify for settlement purposes only.<sup>49</sup> But settlement classes tip the balance of power even further in defendants’ favor: Without plenary class certification, plaintiffs’ attorneys cannot credibly threaten trial and dissatisfied defendants can simply negotiate with other plaintiffs’ lawyers who would welcome settlement and the attorneys’ fees that accompany it.<sup>50</sup> Settlement classes likewise mean that the court will never fully hear or adjudicate the dispute’s merits.<sup>51</sup> These combined circumstances create a substantial risk that settlement classes will undervalue class members’ claims.<sup>52</sup>

Nonclass aggregate settlements fare no better. Removing class certification from the equation forces judges into murky territory; the same principal-agent problems that Rule 23 confronts persist, but judges lack clear policing authority.<sup>53</sup> When a judge certifies a class, Rule 23 bestows the power to appoint class counsel, ensure a fair settlement, and award fees, all of which help prevent counsel from exploiting absent

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plaintiffs’ request to apply California law as a precursor to a motion to certify a nationwide class).

<sup>48</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (“Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.”).

<sup>49</sup> See, e.g., *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047, 2013 WL 499474, at \*11 (E.D. La. Feb. 7, 2013) (certifying settlement class actions); *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, 295 F.R.D. 112, 147 (E.D. La. 2013) (certifying medical benefits settlement class action); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices & Prods. Liab. Litig.*, No. 8:10ML2151JVS (FMOx), 2012 WL 7802852, at \*5 (C.D. Cal. Dec. 28, 2012) (provisionally certifying a national settlement class for economic loss cases); *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, 910 F. Supp. 2d 891, 931 (E.D. La. 2012) (certifying economic benefits settlement class action).

<sup>50</sup> Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 *Geo. Wash. L. Rev.* 951, 953 (2014); see also *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 918 (2011) (“[W]e and other courts have often remarked the incentive of class counsel, in complicity with the defendant’s counsel, to sell out the class . . .”).

<sup>51</sup> Erichson, *supra* note 50, at 953. Courts consider the merits only insofar as they overlap with the certification requirements. *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194–95 (2013).

<sup>52</sup> Erichson, *supra* note 50, at 953.

<sup>53</sup> As I have argued elsewhere, if judges awarded lead lawyers attorneys’ fees on a quantum-meruit theory, that would give judges a valid private law basis for monitoring settlements. Burch, *supra* note 1.

class members.<sup>54</sup> But absent certification, the law treats aggregate settlements the same as other private settlements: Judges have no formal authority.<sup>55</sup>

Without standards and formal supervision, recent nonclass settlements garnered through multidistrict litigation have suffered from self-dealing provisions. Lead lawyers abuse their negotiating position by increasing their attorneys' fees via settlement (presumably by exchanging something of value like lower settlement amounts or higher participation thresholds),<sup>56</sup> or inserting provisions that force participating attorneys to recommend that all their clients accept the settlement offer and withdraw from representing those who refuse.<sup>57</sup> So, although clients are not absent as they are in class actions,<sup>58</sup> their coerced "consent" to these settlements does not legitimize the deal as it might in truly individual litigation.<sup>59</sup> Granted, certified class actions are not perfect either; their merits have been debated extensively.<sup>60</sup> But a certified class—even a certified *issue* class—has judicial

<sup>54</sup> Fed. R. Civ. P. 23(e), (g), (h), advisory committee's notes.

<sup>55</sup> Some judges have attempted to informally approve or disapprove nonclass settlements. E.g., Transcript of Status Conference, In re Vioxx Prods. Liab. Litig., MDL No. 1657, at 4, 30, 36 (E.D. La. Nov. 9, 2007) available at <http://www.laed.uscourts.gov/vioxx/Transcripts/11-9-07.pdf> (convening judges with heavy Vioxx dockets to jointly announce and informally "approve" the settlement alongside lead lawyers). For commentary on this trend, see Burch, *supra* note 1, at 85, 116–17 n.236; Howard M. Erichson, The Role of the Judge in Non-Class Settlements, 90 Wash. U. L. Rev. 1015, 1024 (2013) ("Claims belong to claimants, not to the judge.").

<sup>56</sup> See, e.g., In re Vioxx Prods. Liab. Litig., 760 F. Supp. 2d 640, 645 (E.D. La. 2008) (allowing lead lawyers to contract around the initial three-percent fee cap through the settlement agreement, but reducing the contractual eight percent to six-and-a-half percent); In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05–1708, 2008 WL 682174, at \*2 (D. Minn. Mar. 7, 2008) (permitting the lead attorneys to "contract around" the judge's initial order on fees and increasing their fees substantially—from 2 to 14.4 percent, or by an extra \$29.7 million). For more information, see Burch, *supra* note 1, at 80–81; Charles Silver & Geoffrey P. Miller, The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal, 63 Vand. L. Rev. 107, 109 (2010).

<sup>57</sup> Settlement Agreement ¶ 1.2.8, In re Vioxx Prod. Liab. Litig., MDL No. 05-01657, (E.D. La. Nov. 9, 2007) (initial settlement agreement) (on file with the author). For the many ways in which this agreement arguably ran afoul of the Model Rules of Professional Conduct, see Howard M. Erichson & Benjamin C. Zipursky, Consent Versus Closure, 96 Cornell L. Rev. 265, 280–92 (2011).

<sup>58</sup> *Eubank v. Pella Corp.*, 753 F.3d 718, 719 (7th Cir. 2014) ("The control of the class over its lawyers usually is attenuated, often to the point of nonexistence.").

<sup>59</sup> Elizabeth Chamblee Burch, Group Consensus, Individual Consent, 79 Geo. Wash. L. Rev. 506, 512–14 (2011); Erichson & Zipursky, *supra* note 57, at 274–92.

<sup>60</sup> See, e.g., *Eubank*, 753 F.3d at 719 (noting that the class is "a worthwhile supplement to conventional litigation procedure" but that it is controversial "because it is frequently abused").

quality-control measures and adequate representation checks that so-called “quasi class actions” lack.<sup>61</sup>

## 2. Unpredictable Preclusion

As one might expect, when attorneys leave claims on the table or opt for a settlement class action to leverage bargaining authority that does not exist, dissatisfied plaintiffs will sue again.<sup>62</sup> When plaintiffs initiate subsequent suits, they seek to avoid preclusion by claiming the representative inadequately represented them in the first suit. Multiple regulators escalate preclusion concerns. Defendants may hope to thwart continued litigation on a particular issue, private citizens might want to recover compensation in the wake of a *parens patriae* action, or a state attorney might wish to free ride on private counsel’s efforts.

Assessing adequate representation in the preclusion context is complicated when public regulators’ aims diverge from private claimants’ goals. For instance, public officials might exchange a rapid settlement with splashy headlines for insubstantial contributions to victims, succumb to regulatory capture, distribute awards (if any) inequitably, or use quick settlements to cover up regulatory missteps.<sup>63</sup> And though *parens patriae* cases protect the public interest,<sup>64</sup> they lack Rule 23’s certification procedures, including the adequacy requirement.<sup>65</sup> Thus, when *parens patriae* actions conclude first, no court has tested for intra-group conflicts or conflicts between the state attorney and the citizens.<sup>66</sup>

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<sup>61</sup> Burch, *supra* note 1, at 74, 112.

<sup>62</sup> As the majority in *Wal-Mart Stores, Inc. v. Dukes* observed, this “creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief” and “also create[s] the possibility . . . that individual class members’ compensatory-damages claims would be precluded by litigation they had no power to hold themselves apart from.” 131 S. Ct. 2541, 2559 (2011) (emphasis omitted).

<sup>63</sup> Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 Harv. L. Rev. 486, 498 (2012); Adam S. Zimmerman, *The Corrective Justice State*, 5 J. Tort L. 189, 217 (2014); Eric Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, N.Y. Times, Oct. 29, 2014, at A1.

<sup>64</sup> *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 607 (1982) (holding that a state “must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party” and must “express a quasi-sovereign interest”).

<sup>65</sup> Lemos, *supra* note 63, at 503. Some states have built adequacy requirements into their statutory authority for prosecuting actions under *parens patriae*. See, e.g., 42 U.S.C. § 7604(b)(1)(B) (2012) (barring subsequent citizen suits only if the “Administrator or State has commenced and is diligently prosecuting” an enforcement action).

<sup>66</sup> See *infra* Subsection III.C.3 for a proposed solution to this problem.

Inadequate representation concerns were less prominent in traditional *parens patriae* cases involving truly aggregate rights. When the state sued to vindicate its citizens' public interest in water, wildlife management, or public transit,<sup>67</sup> preclusion was straightforward: The resulting judgment bound both the state and its citizens since the injury affected the public as a whole.<sup>68</sup> But as defendants have exploited jurisdictional imbalances and substantive and procedural limitations to their advantage, state attorneys have waded into murkier territory involving nonstatutory, "quasi-sovereign" claims.<sup>69</sup> Departing from well-traveled paths makes adequate representation and preclusion far less certain; questions persist about whether consumers can "double dip," and, if so, how a defendant can ever achieve finality.<sup>70</sup>

## II. RECONSTITUTING CONDUCT BY RECONSIDERING COHESION

The crux of preclusion and adequate representation often hinges on whether a class is cohesive, a term that lacks a clear definition despite its central importance. Debuting in the 1966 Rules Advisory Committee's

<sup>67</sup> *Wyoming v. Colorado*, 286 U.S. 494, 506–07, 509 (1932) (water rights); *Berman v. Denver Tramway Corp.*, 197 F.2d 946, 951 (10th Cir. 1952) (public transit); *Alaska Legislative Council v. Babbitt*, 15 F. Supp. 2d 19, 23 (D.D.C. 1998), *aff'd* 181 F.3d 1333 (D.C. Cir. 1999) (wildlife management).

<sup>68</sup> *Wyoming v. Colorado*, 286 U.S. at 506–07, 509.

<sup>69</sup> See Gilles & Friedman, *supra* note 2, at 661–68 (urging the greater use of *parens patriae* authority); Lemos, *supra* note 63, at 498 (raising inadequate representation issues). The Supreme Court has been enigmatic in defining the parameters of "quasi-sovereign" interests. *Alfred L. Snapp & Son*, 458 U.S. at 601; 13B Charles A. Wright et al., *Federal Practice & Procedure: Jurisdiction* § 3531.11 (3d ed. 2008). As one commentator observed, "'Quasi-sovereign' is one of those loopy concepts that comes along often enough to remind us that appellate courts sometimes lose their moorings and drift off into the ether. It is a meaningless term absolutely bereft of utility." Jack Ratliff, *Parens Patriae: An Overview*, 74 Tul. L. Rev. 1847, 1851 (2000).

<sup>70</sup> Compare *In re Am. Investors Life Ins. Co. Annuity Mktg. & Sales Practices Litig.*, No. 05-md-1712, 2013 WL 3463503, at \*1 (E.D. Pa. July 10, 2013) (granting in part defendants' motion to enjoin the Pennsylvania Attorney General from seeking restitution—but not other forms of relief—in a civil enforcement proceeding after private plaintiffs entered into a class action settlement), with *Spinelli v. Capital One Bank, USA*, No. 8:08-CV-132-T-33EAJ, 2012 WL 3609028, at \*1, \*3 (M.D. Fla. Aug. 22, 2012) (declining to enjoin Mississippi and Hawaii attorneys general from civil enforcement after a class action settlement and noting that "the government is not bound by private litigation when the government's action seeks to enforce a[ ] statute that implicates both public and private interests"), and *CFTC v. Commercial Hedge Servs., Inc.*, 422 F. Supp. 2d 1057, 1060 (D. Neb. 2006) (refusing to enjoin a federal administrative agency from seeking restitution for private settlement-class members because it was a public agency and therefore not bound by a private agreement).

discussion, reporter Benjamin Kaplan suggested that notice and opt-out rights in Rule 23(b)(3) could solve problems of weak intra-class unity.<sup>71</sup> But the Supreme Court's subsequent approach to class cohesion has been inconsistent at best. In *Amchem Products v. Windsor*, the Court identified cohesion as part of the predominance inquiry under Rule 23(b)(3),<sup>72</sup> but a year later, in *Ortiz v. Fibreboard Corp.*, it suggested that cohesion was ensconced in Rule 23(b)(1)(B), which does not require predominance.<sup>73</sup> Then, in *Wal-Mart Stores v. Dukes*, the Court appeared to locate cohesion within Rule 23(a)(2)'s commonality by requiring "some glue" holding employment decisions together.<sup>74</sup>

So, while Rule 23's text makes no mention of class cohesion, the Court has imported homogeneity concerns into no less than three parts of the Rule—but has not once defined what cohesion means. A close reading of those opinions indicates that the term must refer to a class's internal unity, which qualifies a class to litigate as a single unit.<sup>75</sup> What's lacking, however, is any explanation of what counts as class unity, how much is required, and why it matters. As I and others have theorized elsewhere, cohesion and commonality are not synonymous, cohesion cannot simply be a metric for justifying certification on judicial economy grounds, and cohesion likely serves to mitigate dignity and legitimacy concerns about undermining one's day in court through representative litigation.<sup>76</sup>

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<sup>71</sup> Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 391–94 (1967).

<sup>72</sup> 521 U.S. 591, 623 (1997); see also *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013) ("[P]roof of materiality is not required to establish that a proposed class is 'sufficiently cohesive to warrant adjudication by representation'—the focus of the predominance inquiry under Rule 23(b)(3).").

<sup>73</sup> 527 U.S. 815, 858 (1999) ("[T]he determination whether 'proposed classes are sufficiently cohesive to warrant adjudication' must focus on 'questions that preexist any settlement.'").

<sup>74</sup> 131 S. Ct. 2541, 2545 (2011).

<sup>75</sup> Robert G. Bone, *The Misguided Search for Class Unity*, 82 Geo. Wash. L. Rev. 651, 673–701 (2014).

<sup>76</sup> *Id.*; Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. Rev. 193, 265–69 (1992); Elizabeth Chamblee Burch, *Aggregation, Community, and the Line Between*, 58 Kan. L. Rev. 889, 894–99 (2010); Elizabeth Chamblee Burch, *Calibrating Participation: Reflections on Procedure Versus Procedural Justice*, DePaul L. Rev. (forthcoming 2015) (manuscript at 9–11, 14–18, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2617355](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2617355)). As one can surmise from these different approaches, Professor Bone and I agree on a process-oriented view, but differ as to how that might play out, particularly given my communitarian and procedural justice bent.

Not surprisingly, lower courts and litigants have invoked cohesion haphazardly, using a smattering of metrics to measure it. Courts have, for example, seized upon class members' physical characteristics to presume cohesion,<sup>77</sup> but being the same race or gender does not make a group cohesive or its members' interests uniform.<sup>78</sup> For instance, in desegregation and school busing cases, some class members wanted to improve local black schools instead of integrating, while others wanted to avoid busing their children to integrated but violent schools.<sup>79</sup> Nevertheless, they were lumped into the same class of African Americans seeking integration and busing. The same is true in both Title IX education and Title VII employment-discrimination cases: There are female students who are happy with the status quo and employees who prefer not to sue at all.<sup>80</sup> But they are presumed cohesive and included within the class. Even in securities classes where race and gender are not at issue, courts implement multifactor tests to gauge whether lead plaintiffs are cohesive—all the while overlooking the need for lead plaintiffs to represent class members' diverse interests.<sup>81</sup> Each of these artificial proxies leads courts astray from what truly connects the plaintiffs: the defendant's conduct towards them and plaintiffs' shared interest in holding the defendant accountable.<sup>82</sup>

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<sup>77</sup> See, e.g., *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998) (positing that the Rule 23(b)(2) "class is, by its very nature, assumed to be a homogeneous and cohesive group with few conflicting interests among its members"); Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. Rev. 87, 110 (2011).

<sup>78</sup> Elizabeth Chamblee Burch, *Adequately Representing Groups*, 81 Fordham L. Rev. 3043, 3047–48 (2013).

<sup>79</sup> Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470, 471–72 (1976); Leo Crowley, *Due Process Rights of Absentees in Title VII Class Actions—The Myth of Homogeneity of Interest*, 59 B.U. L. Rev. 661, 666–80 (1979) (arguing that the divergent interests in Title VII cases cause inadequate representation).

<sup>80</sup> See *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 192 F.R.D. 568, 574 (W.D. Mich. 1999) (recognizing the possibility "that members of the class have no desire to pursue this action, and are not unhappy with the status quo").

<sup>81</sup> Elizabeth Chamblee Burch, *Optimal Lead Plaintiffs*, 64 Vand. L. Rev. 1109, 1111, 1141–42, 1151–55 (2011); e.g., *Varghese v. China Shenghuo Pharm. Holdings*, 589 F. Supp. 2d 388, 392 (S.D.N.Y. 2008) (using the following test to evaluate cohesion: "(1) the existence of a pre-litigation relationship between group members; (2) involvement of the group members in the litigation thus far; (3) plans for cooperation; (4) the sophistication of its members; and (5) whether the members chose outside counsel, and not vice versa").

<sup>82</sup> See *Dukes*, 131 S. Ct. at 2565–67 (Ginsburg, J., dissenting) ("The [majority's] 'dissimilarities' approach leads the Court to train its attention on what distinguishes individual class members, rather than on what unites them. . . .").

To be sure, claimants may have genuine bonds or social connections that pre-date the litigation, such as labor unions in the asbestos litigation, support groups in the tainted blood products litigation, veterans' groups in the Agent Orange litigation, or citizens committees in the Buffalo Creek disaster.<sup>83</sup> And, with the advent of the Internet and social media, even geographically dispersed litigants might associate with one another after filing suit, form groups, and effectively govern themselves.<sup>84</sup> So, while it is possible for cohesive groups to pre-date or post-date the lawsuit, that does not change what unified plaintiffs for adjudication purposes: a defendant's actions.<sup>85</sup>

Identifying a defendant's alleged conduct as what often bonds plaintiffs reorients traditional thinking about class cohesion and frees courts to think pragmatically about how to situate, sort, and adjudicate the particular components of any claim.<sup>86</sup> Classifying claims and defenses into their constituent parts and goals—to either regulate a defendant's conduct or determine a plaintiff's eligibility for relief—serves two purposes. First, it illuminates how aggregate proof can interact with substantive law to establish a defendant's common conduct or mask individual differences in proving plaintiffs' eligibility components. Second, it sets the stage for courts to use issue classes to adjudicate components relating to a defendant's uniform conduct as well as plaintiffs' eligibility for relief when it can be satisfied with aggregate proof.

#### *A. Defendant's Conduct Components Versus Plaintiff's Eligibility Components*

Recasting the elements of a claim or defense into conduct components and eligibility components can facilitate sensible and procedurally legitimate outcomes.<sup>87</sup> In most situations, the term "component" will be in-

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<sup>83</sup> Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 298 (2000) (describing the hemophiliac community's HIV litigation); Elizabeth Chamblee Burch, *Litigating Groups*, 61 *Ala. L. Rev.* 1, 21–22 (2009).

<sup>84</sup> Burch, *supra* note 77, at 119–21 (citing examples).

<sup>85</sup> Actual cohesion may justify imposing moral or legal obligations on group members. Burch, *supra* note 83, at 17–20.

<sup>86</sup> I have elaborated on the day-in-court participation aspects of this proposal elsewhere. Burch, *Calibrating Participation*, *supra* note 76, at 18–22.

<sup>87</sup> See generally John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 *Colum. L. Rev.* 1343, 1439–40 (1995) (“[T]he class action would resolve only the issues of liability and generic causation. Each plaintiff would be required to prove in a separate trial the facts demonstrating individual causation in that plaintiff's case (for exam-

terchangeable with what we consider a legal element. But evaluating a design defect under a risk-utility standard, for instance, commingles a defendant's conduct in creating a product with how consumers interact with it. Thus, "component" is a more precise locution devised to reflect the occasional circumstance in which a single legal element cannot be classified holistically.

"Conduct components" concern the defendant's conduct: what a defendant knew, when the defendant knew it, whether a defendant used biased hiring procedures, what changes a corporation made to a product, or how a corporation labeled and advertised a product. In tort law, general causation might classify as a conduct component because it tests whether a defendant's product is capable of causing the harm alleged. When a defendant's actions are uniform and nonindividuated, conduct components are common to all people affected by those actions and are thus theoretically ripe for aggregate treatment.<sup>88</sup> Put differently, adding or subtracting a particular plaintiff when adjudicating a defendant's con-

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ple, that the plaintiff was occupationally exposed to asbestos for a sufficient period to cause the claimed injury or illness."); cf. *Principles of the Law of Aggregate Litigation*, supra note 42, § 2.01 cmt. c (characterizing common issues as arising with respect to "upstream" matters and individual issues cropping up in "downstream" matters "centered upon the individual situations of those claimants themselves").

<sup>88</sup> See, e.g., *In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599, 603 (7th Cir. 2014) (noting that liability issues related to defendant's conduct were "suited to class-wide resolution"); *In re Deepwater Horizon*, 739 F.3d 790, 804, 815–16 (5th Cir. 2014) (noting "the district court set forth a considerable list of issues that were common to all the class members' claims. Nearly all of these issues related to either the complicated factual questions surrounding BP's involvement in the well design, explosion, discharge of oil, and cleanup efforts" and that those issues were certifiable despite "the particular need in such cases for individualized damages calculations"); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 166 (2d Cir. 1978) (upholding certification based on defendant's military-contractor defense); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 8:10ML2151JVS (FMOx), 2012 WL 7802852, at \*2 (C.D. Cal. Dec. 28, 2012) ("The class members' claims all arise from allegations regarding a common defect. Moreover, the class members' claims derive from similar or identical warranties and are based on common advertisements and representations regarding their vehicles."); *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 262 (D.D.C. 2002) ("[A]s to the vitamin product class, plaintiffs have alleged that defendants have participated in a unitary overarching conspiracy which encompassed a number of identified vitamins."); *Jenkins v. Raymark Indus., Inc.*, 109 F.R.D. 269, 279–80 (E.D. Tex. 1985) (certifying a class action based on defendant's state-of-the-art defense); see also Sergio J. Campos, *Mass Torts and Due Process*, 65 *Vand. L. Rev.* 1059, 1068–69 (2012); David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 *Harv. J. on Legis.* 393, 428–29 (2000).

duct should have no effect on the proceedings because conduct components have nothing to do with the plaintiffs' eligibility for relief.<sup>89</sup>

When private plaintiffs sue, they must also demonstrate certain individuated "eligibility components" entitling them to the relief they request. Some eligibility components like reliance, specific causation (proximate cause), and damages fall upon plaintiffs to prove because they are part and parcel of the claim itself. Other eligibility components concern affirmative defenses and require that defendants prove them—statute of limitations or assumption of the risk, for example.<sup>90</sup> Because these elements define which plaintiffs were legally harmed by a defendant's conduct and by how much, they are more individuated than conduct components. Nevertheless, certain substantive doctrines have eliminated this variability. The fraud-on-the-market doctrine in securities class actions provides an apt example. Without it, each purchaser would have to prove that she relied on a company's misstatements, thereby defeating the possibility of a securities class action; with it, the fraud is incorporated into the efficient market's price and those who traded during a particular period satisfy reliance by relying on the market's integrity.<sup>91</sup>

Requests for remedial relief can be classified along similar lines. Divisible remedies, such as compensatory damages, tend to be plaintiff-specific and flow from establishing eligibility components.<sup>92</sup> Indivisible remedies, on the other hand, such as injunctive or declaratory relief, yield uniform results to claimants because they relate to the defendant's conduct, not—as some courts and commentators have maintained—because class members themselves share cohesive physical traits.<sup>93</sup>

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<sup>89</sup> See *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 911 (7th Cir. 2003) ("If there are genuinely common issues, issues identical across all the claimants, issues moreover the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issue in one fell swoop while leaving the remaining, claimant-specific issue to individual follow-on proceedings.").

<sup>90</sup> Granted, if the statute of limitations issue turns on intentional concealment or wrongdoing by the defendant then it could be a conduct component.

<sup>91</sup> *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2408 (2014); *Basic Inc. v. Levinson*, 485 U.S. 224, 246 (1988).

<sup>92</sup> See *Principles of the Law of Aggregate Litigation*, supra note 42, § 2.04(a) ("Divisible remedies are those that entail the distribution of relief to one or more claimants individually, without determining in practical effect the application or availability of the same remedy to any other claimant.").

<sup>93</sup> This is slightly different from the view espoused by the *Principles of the Law of Aggregate Litigation*. Section 2.04 helpfully distinguishes between divisible and indivisible remedies, but defines what is and is not divisible based on the claimant's relationship to the remedy. *Id.* § 2.04(a), (b) ("Indivisible remedies are those such that the distribution of relief to

Granted, there is an eligibility component to indivisible remedies: A court must be able to identify the class of people entitled to enforce the declaratory or injunctive relief and must likewise be able to preclude that group from relitigating the same questions. While those determinations require the certifying court to be precise in defining the class,<sup>94</sup> they should not affect the certification inquiry itself.

To illustrate the basic conduct versus eligibility classification process, consider a few substantive examples from securities, consumer protection, and employment cases.<sup>95</sup> Proving securities fraud under Rule 10b-5 requires plaintiffs to introduce evidence of three conduct-related components: defendant's material misrepresentation or omission;<sup>96</sup> defendant's intent to deceive, manipulate, or defraud (scienter);<sup>97</sup> and a connection between defendant's material misconduct and a securities transaction.<sup>98</sup> But to make a prima facie case of securities fraud, private plaintiffs must also prove eligibility components, including a connection between their purchase or sale and the defendant's misconduct, their reliance on the misconduct, and both economic and loss causation, which demonstrate a causal relationship between the material misrepresentation and the plaintiff's loss.<sup>99</sup>

The conduct components in proving a breach of warranty claim involving an allegedly defective product can be classified similarly: Proving that a defendant issued and breached a warranty—so long as the issuance was standardized across the product in question—might be done

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any claimant as a practical matter determines the application or availability of the same remedy to other claimants.”).

<sup>94</sup> See *infra* Subsection III.A.3 (discussing ascertainability).

<sup>95</sup> Many of these examples are federal theories where the conduct component is relatively uniform throughout the country. State laws may differ in ways that emphasize different evidence. Thus, one must consider whether an issue class using states' laws will materially advance the claims' resolution and whether choice-of-law problems can be overcome by, for instance delineating two or three issue classes that take variations into account. These concerns are addressed in more detail in Subsections III.A.1 and III.A.2 respectively.

<sup>96</sup> *Dura Pharm. v. Broudo*, 544 U.S. 336, 341–42 (2005); *Levinson*, 485 U.S. at 231–32.

<sup>97</sup> *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313–14 (2007); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976).

<sup>98</sup> 17 C.F.R. § 240.10b-5 (2015); Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 12.5, at 481–83 (rev. 5th ed. 2014); e.g., *Popovice v. Milides*, 11 F. Supp. 2d 638, 643 (E.D. Pa. 1998).

<sup>99</sup> *Dura Pharm.*, 544 U.S. at 341–42; Elizabeth Chamblee Burch, *Reassessing Damages in Securities Fraud Class Actions*, 66 Md. L. Rev. 348, 350–51 (2007).

uniformly.<sup>100</sup> Eligibility components vary by state, but often include proving loss or injury to the plaintiff-buyer and a causal connection between the breach of warranty and the plaintiff's loss.<sup>101</sup> So, if plaintiffs alleged that a defendant's design modifications to a washing machine caused it to accumulate mold and thereby violated the defendant's warranty,<sup>102</sup> or if a defendant asserted that its product met industry standards,<sup>103</sup> those allegations concern common conduct components.<sup>104</sup>

Title VII employment-discrimination cases illustrate the fallacy of letting eligibility components doom class treatment of conduct-related components. Plaintiffs must principally prove that a defendant's conduct disparately impacted a protected class by pointing to something like a company-wide policy,<sup>105</sup> a common practice, or a single manager who made personnel decisions.<sup>106</sup> But courts have used faulty reasoning to disintegrate this uniformity. In *Allison v. Citgo Petroleum Corp.*, the

<sup>100</sup> See, e.g., *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 853 (6th Cir. 2013) (noting that in Ohio, "plaintiffs must prove that (1) a defect existed in the product manufactured and sold by the defendant; (2) the defect existed at the time the product left the defendant's hands; and (3) the defect directly and proximately caused the plaintiff's injury or loss"); *Klein v. Sears Roebuck & Co.*, 773 F.2d 1421, 1424 (4th Cir. 1985) (interpreting Maryland law to require proof of the warranty, breach of that warranty, and harm proximately caused by the breach); *Nieberding v. Barrette Outdoor Living, Inc.*, 302 F.R.D. 600, 618 (D. Kan. 2014) ("Here there is essentially one central, common issue of liability: whether the plastic brackets designed by Barrette and sold by Home Depot were defective."); *Morrison v. Sears, Roebuck & Co.*, 354 S.E.2d 495, 497 (N.C. 1987) (interpreting North Carolina law to require plaintiff to prove that there was a warranty, the goods did not comply with the warranty, the plaintiff was injured as a result of the defective goods, and that the plaintiff suffered damages as a result).

<sup>101</sup> *Klein*, 773 F.2d at 1424; *Morrison*, 354 S.E.2d at 497.

<sup>102</sup> See, e.g., *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 798–99 (7th Cir. 2013) ("The basic question presented by the mold claim—are the machines defective in permitting mold to accumulate and generate noxious odors?—is common to the entire mold class, although damages are likely to vary across class members (the owners of the washing machines)."); *In re Whirlpool Corp.*, 722 F.3d at 846 ("The plaintiffs' causes of action rest on the central allegation that all of the Duets share a common design defect—the machines fail to clean properly their own mechanical components to eliminate soil and residue deposits known as 'biofilm.'").

<sup>103</sup> *In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599, 603 (7th Cir. 2014).

<sup>104</sup> *Dukes*, 131 S. Ct. at 2551.

<sup>105</sup> E.g., *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 489–90 (7th Cir. 2012) (reversing the denial of class certification as to defendant's teaming and account distribution policies).

<sup>106</sup> See, e.g., *Allen v. Int'l Truck & Engine Corp.*, 358 F.3d 469, 472 (7th Cir. 2004) (finding that the district court erred by not certifying a class of black employees who complained that the plant's top supervisors told them nothing would be done in response to pervasive hostility and harassment).

U.S. Court of Appeals for the Fifth Circuit claimed that: “The underlying premise of the (b)(2) class—that its members suffer from a common injury properly addressed by classwide relief—‘begins to break down when the class seeks to recover back pay or other forms of monetary relief.’”<sup>107</sup> A defendant’s conduct toward a protected group is no less common when that group seeks divisible remedies. Nor does the request for monetary relief change the basic calculus of whether litigating plaintiffs’ allegations as to a defendant’s conduct will “resolve an issue that is central to the validity of each one of the claims in one stroke.”<sup>108</sup> Rather, the trouble comes in litigating conduct and eligibility components in a single, class-wide proceeding.

Title VII cases have also suffered from remedial requests that do not fall neatly into a divisible or indivisible category. Punitive damages punish a defendant’s pattern of discriminatory behavior toward certain employees and hinge on whether plaintiffs can establish the wrongfulness of a defendant’s conduct toward the class as a whole.<sup>109</sup> Yet recent Supreme Court cases on punitive damages and Title VII seem to tie punitive damages to eligibility components.<sup>110</sup> Each employee is eligible for up to \$300,000 in punitive damages, but must demonstrate that the employer engaged in a pattern or practice of discrimination “with malice or

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<sup>107</sup> 151 F.3d 402, 413 (5th Cir. 1998) (quoting *Eubanks v. Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997)).

<sup>108</sup> *Dukes*, 131 S. Ct. at 2551.

<sup>109</sup> See, e.g., *Palmer v. Combined Ins. Co. of Am.*, 217 F.R.D. 430, 438 (N.D. Ill. 2003) (focusing on defendant’s conduct as opposed to the class members’ individualized harms); *Barefield v. Chevron, U.S.A., Inc.*, No. C 86-2427TEH, 1988 WL 188433, at \*3 (N.D. Cal. Dec. 6, 1988) (“A class claim for punitive damages does not detract from the homogeneity or cohesiveness of the class. Rather, it is consistent with the notion that the focus of a (b)(2) action is the defendant’s conduct toward persons sharing a common characteristic. Because the purpose of punitive damages is not to compensate the victim, but to punish and deter the defendant, any claim for such damages hinges, not on facts unique to each class member, but on the defendant’s conduct toward the class as a whole.”); cf. *Citgo Petroleum Corp.*, 151 F.3d at 417 (refusing to decide whether punitive damages are available on a class-wide basis).

<sup>110</sup> *State Farm Mutual Auto Insurance v. Campbell*, 538 U.S. 408 (2003), *Phillip Morris USA v. Williams*, 549 U.S. 346 (2007), and *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), can each be read to suggest that punitive damages remedy individual injuries. The upshot of *Williams* is that punitive-damage awards can punish the defendant’s wrongdoing only as to a particular plaintiff, not as to those similarly situated. 549 U.S. at 353–54. *Exxon Shipping Co.* and *State Farm Mutual Auto Insurance* both indicate that punitive-damage awards must be tethered to compensatory damages (or, at the very least, backpay). *Exxon*, 554 U.S. at 514; *Campbell*, 538 U.S. at 423; see also Linda S. Mullenix, *Nine Lives: The Punitive Damage Class*, 58 U. Kan. L. Rev. 845, 849 (2010).

with reckless indifference to the federally protected rights of an aggrieved *individual*.”<sup>111</sup> Thus, some have argued that plaintiffs must demonstrate individual injuries to receive punitive damages.<sup>112</sup>

Punitive damages straddle the conceptual line between conduct and eligibility in tort law as well; classifying them often entails examining the underlying substantive doctrine. For example, states have reached conflicting outcomes on punitive damages in tobacco cases. In California, an individual’s punitive-damage claim arises out of her own personal and emotional injuries, and thus qualifies as an eligibility component.<sup>113</sup> But in New York, punitive damages are firmly tethered to the defendant’s conduct: they aim to deter wrongful conduct, punish misbehavior for the public good, and benefit the general public—not private parties.<sup>114</sup> Plaintiffs must demonstrate “grave misconduct affecting the public generally” as opposed to an “individually sustained wrong.”<sup>115</sup> Thus, punitive damages are conduct components that could be adjudicated collectively.

Harder cases like medical monitoring can likewise benefit from this conduct versus eligibility classification. Medical monitoring varies from state to state, but the heart of the claim goes to defendant’s conduct: A defendant has put people in peril by exposing them to a harmful substance and therefore has an obligation to minimize future risk of injury by covering medical-monitoring costs. Medical monitoring is thus akin to other affirmative tort duties. If a driver runs someone off the road at night but does not injure her, yet drives off instead of shining his headlights in her direction, the driver is liable if the victim subsequently falls off a cliff.<sup>116</sup> The driver’s failure to shine his headlights is a conduct component, whereas the victim’s proof of subsequent injury is an eligi-

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<sup>111</sup> 42 U.S.C. § 1981a(b)(1), (b)(3) (2012) (emphasis added).

<sup>112</sup> E.g., *Citgo Petroleum Corp.*, 151 F.3d at 417 (noting that the plain language of the Civil Rights Act of 1991 could be interpreted this way, but declining to reach the question).

<sup>113</sup> *Bullock v. Phillip Morris USA, Inc.*, 131 Cal. Rptr. 3d 382, 392 (Cal. Ct. App. 2011).

<sup>114</sup> *Clinton v. Brown & Williamson Holdings, Inc.*, 498 F. Supp. 2d 639, 653 (S.D.N.Y. 2007); *Fabiano v. Phillip Morris, Inc.*, 54 A.D.3d 146, 150 (N.Y. App. Div. 2008); *Grill v. Philip Morris USA, Inc.*, 653 F. Supp. 2d 481, 498 (S.D.N.Y. 2009); *Shea v. Am. Tobacco Co.*, 73 A.D.3d 730, 732 (N.Y. App. Div. 2010).

<sup>115</sup> *Fabiano*, 54 A.D.3d at 150; see also *Grill*, 653 F. Supp. 2d at 498; *Shea*, 73 A.D.3d at 732. Some states even require a percentage of punitive damages to be paid into the state’s treasury. See, e.g., Ga. Code Ann. § 51-12-5.1(e)(2) (2015) (requiring 75% of punitive damages awarded to be paid into the State treasury).

<sup>116</sup> John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 Va. L. Rev. 1625, 1710 (2002).

bility component. Similarly, in medical monitoring the defendant's behavior in creating and exposing plaintiffs to a hazardous substance is "a primary duty of conduct,"<sup>117</sup> not "a secondary duty to compensate,"<sup>118</sup> which would be an eligibility component.

### *B. Aggregate Proof*

Identifying and labeling the parts in any claim or defense as either conduct or eligibility components properly reorients, in the abstract, the notion of collectively determining whether the defendant's conduct was wrongful, even if that conduct affects plaintiffs differently. Courts are more likely to certify a class when plaintiffs offer proof (or a disputed legal question) that applies to all of them equally.<sup>119</sup> But moving from the abstract to the specific raises questions about *how* plaintiffs prove the defendant's conduct—whether through aggregate, "top-down" proof about the defendant's act or acts, or individual, "bottom-up" proof that reveals the defendant's true colors only by demonstrating how the defendant treated similarly situated individuals. It also raises questions about the legitimacy of de-emphasizing variances among eligibility components through statistical proof.

To smooth over differences in individual proof, plaintiffs' attorneys have employed two principal strategies. First, they have argued that the underlying substantive doctrine facilitates aggregate treatment by, for example, bootstrapping disparate state law claims into a uniform federal cause of action.<sup>120</sup> Second, they have deployed statistical models to transform individual "bottom-up" proof of the defendant's conduct or classic eligibility components like damages into something that appears common. As such, decentralized wrongs might seem uniform and plaintiffs could dispense with individual proof.<sup>121</sup>

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 1710–11.

<sup>119</sup> This discussion of conduct versus eligibility components does not explicitly address disputed legal questions that might apply to all plaintiffs or all defendants, such as whether a market-share theory of liability might apply to asbestos cases or whether the statute of limitations should be extended because of the defendant's intentional concealment. But the omission is not meant to exclude legal questions from consideration, particularly if resolving them en masse would materially advance the claims' resolution as Subsection III.A.1 describes.

<sup>120</sup> See *infra* notes 122–30.

<sup>121</sup> See *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 262 (D.D.C. 2002) ("[P]redominance is met 'when there exists generalized evidence which proves or disproves an element on a sim-

Consider a prototypical example first. In securities fraud cases, when a defendant makes a single, material fraudulent statement (the conduct component), investors will experience different damages and some may not be harmed at all (eligibility components). If each plaintiff sued individually, courts would hear similar evidence of the defendant's misconduct repeatedly. The evidence used to prove the defendant's misstatement, in other words, is functionally equivalent and could be proven collectively. But substantive doctrines like fraud-on-the-market and statistical methods for modeling damages also make it possible for plaintiffs to collectively prove eligibility components like reliance and damages. The procedural effect is that common questions tend to predominate over individual ones, making securities class actions easier to certify under Rule 23(b)(3).

The trick then is to replicate that result in other cases: to repackage ordinary breach of contract or negligence claims into substantive law like RICO or medical monitoring where courts focus on defendant's conduct, not individual harms.<sup>122</sup> For example, after early efforts to certify negligence claims against tobacco companies failed to satisfy Rule 23(b)(3)'s predominance,<sup>123</sup> plaintiffs tried to use medical monitoring to shift the court's attention to the defendant's wrongful conduct and away from smokers' individual circumstances.<sup>124</sup> But the class in *Barnes v. American Tobacco Co.* was reversed on appeal. Defining class membership based on whether one was addicted to nicotine introduced eligibility components and unraveled the focus on defendants' conduct.<sup>125</sup> In *Donovan v. Philip Morris USA, Inc.*, however, attorneys successfully de-

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ultaneous, class-wide basis, since such proof obviates the need to examine each class members' individual position.'" (quoting *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 693 (D. Minn. 1995)); Nagareda, *supra* note 24, at 101–02 (“[A]ggregate proof then seeks to trigger the application of substantive doctrine in such a way as to suggest a common, class-wide wrong attributable to the defendant.”).

<sup>122</sup> See, e.g., *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices & Prods. Liab. Litig.*, 826 F. Supp. 2d 1180, 1199–1200 (C.D. Cal. 2011) (considering RICO claims in conjunction with other economic damage claims).

<sup>123</sup> See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741–42 (5th Cir. 1996) (decertifying an issue class as to core liability issues for failing to meet the predominance standard).

<sup>124</sup> Nagareda, *supra* note 24, at 119.

<sup>125</sup> 161 F.3d 127, 145 (3d Cir. 1998); see also *Gargano v. Philip Morris USA, Inc.*, No. 10-24042, 2011 WL 2445869, at \*5 (S.D. Fla. June 20, 2011) (decertifying a medical monitoring class under Florida law); *Caronia v. Philip Morris USA, Inc.*, No. 06-CV-224(CBA)(SMG), 2011 WL 338425, at \*6 (E.D.N.Y. Jan. 13, 2011) (decertifying a medical monitoring class under New York law).

fined the medical-monitoring class using pack years<sup>126</sup> and targeted the defendant's conduct under Massachusetts law, which simply required plaintiffs to show "that an available design modification would reduce risk."<sup>127</sup>

Tobacco plaintiffs used RICO in much the same way as medical monitoring. Portraying their injury in economic terms based on the cigarette market allowed plaintiffs to downplay eligibility components.<sup>128</sup> At the time, RICO required individual proof of reliance and proximate cause (both eligibility components), which doomed the predominance inquiry on appeal.<sup>129</sup> But the Supreme Court later clarified that RICO plaintiffs need not show reliance either "as an element of [their] claim or as a prerequisite to establishing proximate causation."<sup>130</sup> Thus, the gambit might gain more traction today.

Similar strategies for aggregating proof can be seen in employment discrimination under Title VII. When the defendant's conduct affects plaintiffs uniformly through a single policy for assigning accounts to brokers or a biased testing procedure, that evidence is common across the class.<sup>131</sup> Declaratory or injunctive relief can then remedy uniform conduct.

But sometimes an employer's conduct comes into focus only if the court takes a bird's eye view of multiple plaintiffs' claims. Because most corporations have eliminated blatantly racist or sexist policies, a pattern or practice may emerge only by considering a series of individual circumstances. The proof is not aggregate proof. Like pointillism, the full picture emerges not from a single dot but from proving how an employer treated many different individuals. Yet judges tend to deny class certification in these cases because they characterize them as separate discrim-

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<sup>126</sup> "[A] 'pack-year' is the average number of packs of cigarettes smoked per day multiplied by the number of years the person has smoked. One pack a day for twenty years, for example, equals twenty pack-years." *Donovan v. Philip Morris USA, Inc.*, No. 06-12234-DJC, 2012 WL 957633, at \*1 n.1 (D. Mass. Mar. 21, 2012).

<sup>127</sup> *Id.* at \*25.

<sup>128</sup> *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1127–28 (E.D.N.Y. 2006); Nagareda, *supra* note 24, at 145.

<sup>129</sup> *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 223–28 (2d Cir. 2008).

<sup>130</sup> *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 656 (2008).

<sup>131</sup> E.g., *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982) (suggesting biased testing procedures would satisfy commonality and typicality); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491 (7th Cir. 2012) (certifying account distribution and teaming policies).

ination claims stemming from an array of individual incidents.<sup>132</sup> Thus, courts have properly denied certification in cases like *Rutstein v. Avis Rent-A-Car Systems*, where plaintiffs would have to demonstrate the individualized circumstances of why they were denied car rentals to show religious animus on Avis's part,<sup>133</sup> and *Jackson v. Motel 6 Multipurpose, Inc.*, where each plaintiff would have to prove why they were denied accommodations or given dirty hotel rooms to show racial discrimination.<sup>134</sup>

Accordingly, Title VII litigants increasingly invoke statistical proof to magically transform what might ordinarily be seen as a "bottom-up," noncertifiable claim into one that looks common across the corpus of plaintiffs in a "top-down" fashion. Take the evidence presented in *Wal-Mart Stores, Inc. v. Dukes*, for example.<sup>135</sup> Wal-Mart had an anti-discrimination policy, but plaintiffs alleged that the tap-on-the-shoulder practice of giving supervisors promotion discretion disparately impacted female employees.<sup>136</sup> Plaintiffs' lawyers offered anecdotal experiences and economic regression analyses showing "statistically significant disparities between men and women at Wal-Mart [that] . . . can be explained only by gender discrimination."<sup>137</sup> If offered alone, plaintiffs' anecdotal experiences would be no different than *Rutstein* or *Motel 6*—factfinders could infer wrongdoing on Wal-Mart's part only by first considering each employee's experience and then taking a bird's eye view of that collective evidence. But the economic regression analysis tried to

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<sup>132</sup> *Klay v. Humana, Inc.*, 382 F.3d 1241, 1257 (11th Cir. 2004) (reversing certification on breach of contract claims because commonalities were outweighed by individual issues), abrogated on other grounds by *Phoenix Bond & Indem. Co.*, 553 U.S. 639.

<sup>133</sup> 211 F.3d 1228, 1235 (11th Cir. 2000) (denying class certification because "[e]ach plaintiff [would] have to bring forth evidence demonstrating that the defendant had an intent to treat him or her less favorably because of the plaintiff's Jewish ethnicity").

<sup>134</sup> 130 F.3d 999, 1006 (11th Cir. 1997) (denying class certification because plaintiffs' proof would have "require[d] distinctly case-specific inquiries into the facts surrounding each alleged incident of discrimination").

<sup>135</sup> Nagareda, *supra* note 24, at 156.

<sup>136</sup> *Dukes*, 131 S. Ct. at 2554.

<sup>137</sup> *Id.* at 2554–56. Plaintiffs also introduced a social framework analysis, but it was plagued by credibility and reliability questions. See John Monahan, Laurens Walker & Gregory Mitchell, *The Limits of Social Framework Evidence*, 8 L., Probability & Risk 307, 308 (2009) (noting that "general social science research can provide a valuable context for deciding case-specific factual issues" but those findings "cannot be linked by an expert witness to the facts of a specific case;" rather, those links "must be recognized as arguments to be made by the attorneys, rather than evidentiary proof that can be offered by expert witnesses").

do this for the factfinder; it created aggregate workforce data by comparing the number of women promoted with the number of women in the hourly worker pool.<sup>138</sup> Nevertheless, the illusion of aggregate proof failed.

When a defendant's conduct is decentralized and requires proof of the plaintiffs' individual circumstances, attempts to mask heterogeneity through statistical proof do not fare well. And, as a procedural mechanism, issue classes should not change that result. But the tobacco examples are different. They illustrate ways in which plaintiffs' lawyers engineer substantive doctrine to isolate defendant's conduct and facilitate aggregate resolution. The conduct itself was uniform—either tobacco companies manipulated nicotine levels or they did not. The eligibility components were the problem: Adjudicating plaintiffs' eligibility for relief alongside defendant's conduct risked undermining aggregate treatment altogether. In situations like these, issue classes can perform some heavy lifting by divorcing conduct components from eligibility components and situating the former for certification.

### *C. Implications for Issue Classes*

This discussion of conduct versus eligibility components and aggregate proof has at least six critical implications for issue classes. First, the obvious: When the underlying substantive law discards individualized proof as to eligibility components, it makes it possible to certify otherwise disparate issues for aggregate adjudication. Those issues can likewise add to the tableau of commonalities under Rule 23(b)(3). The same is true when substantive law, like RICO, focuses judges' attention on a defendant's conduct as opposed to plaintiffs' eligibility for relief.

Second, the circumstances under which plaintiffs offer statistical and economic proof should inform its effect on certification. When the underlying law governing eligibility components already treats plaintiffs as a unit (think fraud-on-the-market in securities cases or reliance in RICO), offering expert models is logical and widely accepted, provided they are reliable under *Daubert*.<sup>139</sup> But plaintiffs have also offered statistical and economic models to satisfy substantive law that ordinarily de-

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<sup>138</sup> *Dukes*, 131 S. Ct. at 2555.

<sup>139</sup> *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 591 (1993); L. Elizabeth Chamblee, Between "Merit Inquiry" and "Rigorous Analysis": Using *Daubert* to Navigate the Gray Areas of Federal Class Action Certification, 31 Fla. St. U. L. Rev. 1041, 1065–79 (2004).

mands individual proof. This move seeks to agglomerate individual eligibility components via expert testimony and statistical methodology.

In both *Wal-Mart Stores, Inc. v. Dukes* and *Comcast Corp. v. Behrend* the Supreme Court rejected agglomerated evidence of conduct and eligibility components, respectively. As to conduct components, Wal-Mart's practice of giving supervisors discretion over hiring and promotion decisions eliminated the possibility of common proof via an official top-down policy. Thus, to prove a disparate impact, plaintiffs had to show that supervisors exercised their discretion in a discriminatory way. But to do that without offering a series of individual factual scenarios that, taken together, painted a picture of sex discrimination required agglomerated economic regression analyses. When deconstructed, however, that analysis was similar to *Rutstein* and *Motel 6*—the defendant's conduct was not uniform.<sup>140</sup>

In *Comcast*, antitrust plaintiffs had to prove their damages—an eligibility component. To do so, they introduced a damage model. The problem here, however, was not the use of agglomerated proof, per se, but that the model took all four of plaintiffs' antitrust theories into account as opposed to the only theory certified for class treatment—the over-builder theory.<sup>141</sup> But the takeaway here is different from *Dukes*. Because the defect stemmed from an evidentiary question of reliability,<sup>142</sup> reliable models could still eliminate the need to adjudicate plaintiffs' damages individually. Put simply, when agglomerated evidence tries to turn a defendant's decentralized conduct toward discrete individuals into uniform conduct, the illusion fails. But when a defendant's common conduct injures plaintiffs, plaintiffs might successfully introduce reliable statistical methods to prove eligibility for damages so long as substantive law permits aggregate proof.

Third, situating a defendant's conduct as what glues class members together, regardless of the type of class, may unify what might otherwise be a disparate group of people and inform the commonality inquiries

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<sup>140</sup> *Dukes*, 131 S. Ct. at 2551; supra notes 133–34 and accompanying text (discussing *Motel 6* and *Rutstein*).

<sup>141</sup> *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1434 (2013).

<sup>142</sup> As the dissenters in *Comcast* point out, Comcast never objected to the damage model. *Id.* at 1436–37 (Ginsburg, J., dissenting).

under both Rule 23(a) and (b)(3).<sup>143</sup> Even though some class members may have bonds that pre- or post-date the litigation, that bond is not what commonality tests: It tests cohesiveness for adjudication. So, as *Dukes* requires, class-wide proceedings that adjudicate a defendant's conduct can generate common answers and help resolve the litigation.<sup>144</sup>

Fourth, when plaintiffs request indivisible relief to alleviate a defendant's conduct, partial certification might fall within Rule 23(b)(2)'s mandatory ambit.<sup>145</sup> Rule 23(b)(2) requires the defendant to have "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."<sup>146</sup> Setting aside eligibility components such as damage claims and focusing on declaratory or injunctive relief can pave the way to certify a mandatory class even in cases like consumer fraud. For example, in *Pella Corp. v. Saltzman*, plaintiffs created a permissible, nationwide (b)(2) class requesting six declarations centering on whether the defendant's windows were defective, but left eligibility components like proximate cause and damages for individual determination.<sup>147</sup>

Some might claim that this creates a due process problem: Losing a mandatory issue class could preclude individual damage trials without affording members the right to opt out under *Phillips Petroleum Co. v. Shutts*.<sup>148</sup> But this view misunderstands the distinction between uniform and decentralized misconduct. As *Dukes*, *Motel 6*, and *Rutstein* illustrate, decentralized conduct cannot be raised or adjudicated in class-wide proceedings;<sup>149</sup> individual claims should not be certified or precluded. But if the defendant's conduct is uniform, a mandatory issue class can

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<sup>143</sup> In re Deepwater Horizon, 739 F.3d 790, 816 (5th Cir. 2014) (concluding that the commonalities as to defendant's conduct could be tried separately from liability issues and that it was thus "possible to satisfy the predominance . . . requirements of Rule 23(b)(3) in a mass tort or mass accident class action' despite the particular need in such cases for individualized damages calculations").

<sup>144</sup> See *Dukes*, 131 S. Ct. at 2551.

<sup>145</sup> E.g., *Pella Corp. v. Saltzman*, 606 F.3d 391, 396 (7th Cir. 2010); *Allan v. Int'l Truck & Engine Corp.*, 358 F.3d 469, 471 (7th Cir. 2004).

<sup>146</sup> Fed. R. Civ. P. 23(b)(2).

<sup>147</sup> *Pella Corp.*, 606 F.3d at 392–93.

<sup>148</sup> 472 U.S. 797, 811–12 n.3 (1985) (requiring notice, an opportunity to be heard, and an opportunity to opt out when an action seeks to bind plaintiffs concerning claims wholly or predominantly for money judgments but not extending that view to equitable class actions).

<sup>149</sup> See *supra* notes 132–37 and accompanying text (discussing these cases).

level the playing field and avoid inconsistent judgments so long as the substantive doctrine does not vary much from state to state.<sup>150</sup> Thus, unless plaintiffs were inadequately represented, their damage claims should be precluded if the defendant wins.<sup>151</sup>

Fifth, distinguishing between conduct and eligibility components informs not only commonality, but Rule 23(a)'s other queries as well. Typicality tests whether a defendant's conduct toward the class representative is typical of how a defendant's conduct affected other class members and thus screens decentralized conduct.<sup>152</sup> Numerosity considers whether the group affected by a defendant's conduct is so widespread that representative litigation makes sense.<sup>153</sup> And the adequate representation requirement, which often poses a stumbling block, should prove less disruptive when courts certify conduct components. Most disabling conflicts arise from eligibility components like reliance, loss causation, and damages, which tend to be more individuated.<sup>154</sup> When courts just certify a defendant's conduct, they should tolerate greater conflicts because plaintiffs share an objective focus on establishing a defendant's liability. Thus, unless class counsel acts contrary to the class's best interest or attempts to represent an over-inclusive group where the

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<sup>150</sup> See *infra* Subsection III.B.2 (discussing resource parity and outcome equality).

<sup>151</sup> See *infra* notes 334–42 and accompanying text (discussing inadequate representation).

<sup>152</sup> Fed. R. Civ. P. 23(a)(3).

<sup>153</sup> *Id.* 23(a)(1).

<sup>154</sup> See *In re Zyprexa Prods. Liab. Litig.*, 671 F. Supp. 2d 397, 434 (E.D.N.Y. 2009) (“Despite this court’s view to the contrary, appellate class action decisions have held that issues of reliance, loss-causation, and injury are inappropriate for aggregation, due to the need to prove these elements on an individualized basis for each victim or injured party.”) (citing decisions). See generally *Principles of the Law of Aggregate Litigation*, *supra* note 42, § 2.02 cmt. a (“[A]ccumulated experience with the class-action device suggests that aggregate treatment of a common issue will materially advance the resolution of multiple civil claims more frequently when the issue concerns ‘upstream’ matters focused on the generally applicable conduct of those opposing the claimants in the litigation as distinct from ‘downstream’ matters focused on those claimants themselves.”).

requested relief could be detrimental to some class members,<sup>155</sup> representation should be adequate.<sup>156</sup>

Finally, there are two precautions. First, certifying an issue class should not become a backdoor to plenary certification via a settlement class action. If judges conduct their issue class inquiry as this Article suggests, then certifying a settlement class must entail a separate Rule 23 analysis. Because settlement classes encompass all aspects of a case, they can raise new intra-class conflicts. Moreover, a distinct certification analysis serves as an additional safeguard against weak lawyers negotiating and certifying weak settlements. Second, when conduct components and eligibility components are intertwined within a single legal element, issue classes should not serve as an excuse to create “sterile” trials. For instance, in design-defect cases, states often employ a risk-utility test that considers the product’s utility to the public and the individual user. Consequently, evaluating a defendant’s liability may necessitate not only assessing whether a safer and reasonably priced alternative existed, but also testimony from exemplar plaintiffs about the product’s utility—or lack thereof.

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<sup>155</sup> See, e.g., *Hansberry v. Lee*, 311 U.S. 32, 45 (1940) (attempting to include blacks within a class seeking to enforce a racially restrictive covenant); *Spano v. Boeing Co.*, 633 F.3d 574, 587 (7th Cir. 2011) (noting that many proposed class members had no complaint about ERISA investment opportunities and would be harmed by the relief the named plaintiffs requested); *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280 (11th Cir. 2000) (observing that the proposed class included people who claimed they were harmed by the same acts that benefitted others).

<sup>156</sup> *Burch*, supra note 78, at 3044, 3061. Conflicts over eligibility elements include issues like differences over remedies and insurance coverage. E.g., *Kasten v. Saint-Gobain Performance Plastics Corp.*, 556 F. Supp. 2d 941, 958 (W.D. Wis. 2008) (subclassing a class action because of different statutes of limitation); *Maloney v. Califano*, 88 F.R.D. 293, 294–95 (D.N.M. 1980) (subclassing based on the time taken by the government to make individual disability determinations). As to how remedies might divide members, if some claimants required immediate medical attention, they would receive far less benefit from a settlement that provided research funds. See generally *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 160 (S.D. Ohio 1992) (including claimants who had to have their heart valve removed immediately and thus did not benefit from the settlement’s research and development fund without special representation); see also Jay Tidmarsh, *Fed. Judicial Ctr., Mass Tort Settlement Class Actions: Five Case Studies* 43 (1998) (expressing concern over the lack of separate representation in *Bowling v. Pfizer, Inc.*).

## III. THE PARITY AND PROMISE OF ISSUE CLASSES

Making the analytical move toward understanding and classifying the elements in any claim or defense as related to either a defendant's conduct or plaintiffs' eligibility for relief, combined with an understanding of how the methods for proving those components can contribute to or undermine their aggregate nature sets the stage for courts' greater use of issue classes. Issue classes can circumvent the mismatch between private attorneys' regulatory reach in light of stricter certification standards and a defendant's nationwide conduct.<sup>157</sup> Currently, even when a defendant acts uniformly, eligibility components inject variances that have rendered class certification unlikely. But issue classes can do what plaintiffs' attorneys have tried to accomplish through manipulating substantive law and representing only a subset of claims: They can spotlight a defendant's conduct. Issue classes are thus well positioned to eliminate the most egregious aspects of the prism effect, recapture for both public and private regulators what is common to all of them, and resolve a defendant's conduct on the merits.

Nevertheless, a host of logistical, doctrinal, and political questions remains. These questions range from the mechanics of Rule 23, parties' incentives, and accuracy and fairness considerations to the pragmatics of issue classes in multidistrict litigation. Accordingly, this Part explores the following questions: When are issue classes appropriate within Rule 23's framework and how do choice-of-law concerns affect that inquiry? How can fees incentivize plaintiffs' attorneys to initiate issue classes when the compensation structure is predicated on the presence of a common fund? How can defendants be assured of two-way preclusion? Might additional error-correcting mechanisms prevent undue settlement pressure? How and when should transferee judges remand cases to transferor courts? And can issue classes coordinate the public and private regulatory response while preventing Seventh Amendment Reexamination Clause concerns?

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<sup>157</sup> Jessie Kokrda Kamens, *Experts Say Recent Seventh Circuit Ruling May Not Make 'Issue Certification' Trendy*, *Class Action Litig. Rep. (BNA)* (Mar. 9, 2012) (quoting Professor John C. Coffee, Jr., "I have long argued that 'partial' or 'issue' certification is the only way out of the dilemma created by the increasingly rigid judicial interpretation of the predominance requirement of Rule 23(b)(3)") (internal quotation marks omitted)).

*A. Constructing Functional Issue Classes*

Despite the promise of issue classes, in years past, courts and commentators diverged over whether and when to certify them. Those divisions stemmed, in part, from the scant guidance in Rule 23(c)(4), which simply states, “When appropriate, an action may be brought or maintained as a class action with respect to particular issues.”<sup>158</sup> Judges thus created a substantial body of federal common law to fill in the gaps, but their initial solutions were haphazard and varied. Recent years have witnessed a greater convergence on that front, but new divisions over whether class members are “ascertainable” have sparked different debates.<sup>159</sup>

*1. Materially Advancing the Resolution of the Claim*

Courts’ once sharp divisions over whether and when to certify issue classes have softened substantially in the wake of *Comcast* and *Dukes*. Several recent appellate decisions suggest a greater willingness to certify issue classes in toxic torts,<sup>160</sup> product liability,<sup>161</sup> consumer protection,<sup>162</sup> and employment discrimination.<sup>163</sup> The principal disagreement in the debate once centered on Rule 23(b)(3)’s predominance inquiry: Could litigants slice an issue from the litigation’s constellation of questions and conduct a predominance inquiry as to only that issue, or must a judge first decide that common questions predominate over individual ones such that Rule 23(c)(4) becomes a housekeeping tool to manage what is already a manageable class? For a while the Fifth Circuit consistently adhered to the latter view,<sup>164</sup> but recently changed course in *In re Deep-*

<sup>158</sup> Fed. R. Civ. P. 23(c)(4).

<sup>159</sup> As the Rule 23 subcommittee contemplates changes to the Rule, this suggests that no changes are needed to Rule 23(c)(4), but might be appropriate as to “ascertainability.”

<sup>160</sup> *In re Deepwater Horizon*, 739 F.3d 790, 806–07, 816 (5th Cir. 2014).

<sup>161</sup> *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 799 (7th Cir. 2013); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 853–54 (6th Cir. 2013).

<sup>162</sup> *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010).

<sup>163</sup> *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 489 (7th Cir. 2012).

<sup>164</sup> *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745–46 n.21 (5th Cir. 1996) (“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 . . . .”); see also Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 *Emory L.J.* 709, 748 (2003) (arguing that Rule 23 “never intended . . . to authorize expansive issue class actions”); David L. Shapiro, *Class Actions: The Class as Party and Cli-*

*water Horizon*.<sup>165</sup> The First,<sup>166</sup> Second,<sup>167</sup> Third,<sup>168</sup> Fourth,<sup>169</sup> Sixth,<sup>170</sup> Seventh,<sup>171</sup> Ninth,<sup>172</sup> and Eleventh<sup>173</sup> Circuits have each taken various approaches that facilitate issue classes to different degrees. Perhaps due

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ent, 73 Notre Dame L. Rev. 913, 955 (1998) (noting that the predominance requirement “has generally been understood (and I think correctly) to override the possibility of certification of a class on particular issues under Rule 23(c)(4) unless those issues are found to ‘predominate’ over the individual ones in the case”).

<sup>165</sup> *Deepwater Horizon*, 739 F.3d at 806 (observing that the district court had planned to sever liability from damage issues and try them separately, noting that plan accorded “with this court’s previous case law and Rule 23(c)(4),” and favorably citing *Butler*, 727 F.3d at 800 (“[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.”)).

<sup>166</sup> The First Circuit has not said explicitly how it would evaluate the predominance inquiry within issue classes but has noted 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.” *Smilow v. Sw. Bell Mobile Sys.*, 323 F.3d 32, 41 (1st Cir. 2003).

<sup>167</sup> *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006) (“[A] court may employ subsection (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.”).

<sup>168</sup> *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 273 (3d Cir. 2011) (adopting the approach advocated by the *Principles of the Law of Aggregate Litigation* and suggesting that trial courts consider a series of factors).

<sup>169</sup> *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 438–39 (4th Cir. 2003) (“According to the dissent, a district court must first ‘determine that’ an entire lawsuit ‘as [a] whole’ . . . satisfies the predominance and superiority requirements imposed by 23(b)(3) and only if the entire lawsuit does satisfy these requirements may a court ‘manage[ ] through orders authorized by 23(c).’ The dissent’s argument finds no support in the law—not in Rule 23 itself nor in any case or treatise.”).

<sup>170</sup> *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860–61 (6th Cir. 2013) (noting that “‘when adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate’[.]” mentioning the availability of Rules 23(c)(4) and (c)(5), and concluding that certifying a liability class would further economies of scale and make a negative-value consumer class possible) (quoting *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1437 (2013)).

<sup>171</sup> *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 489 (7th Cir. 2012); *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 911–12 (7th Cir. 2003).

<sup>172</sup> *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

<sup>173</sup> *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1359–60 (11th Cir. 2009) (permitting hybrid class actions under Rule 23(b)(2) and Rule 23(c)(4)); *Klay v. Humana, Inc.*, 382 F.3d 1241, 1258–59, 1265 (11th Cir. 2004) (conducting the predominance inquiry as to the RICO claim and certifying that claim but not a claim for breach of contract).

to this emerging consensus, the Supreme Court has declined multiple opportunities to weigh in.<sup>174</sup>

In 2010, the American Law Institute approved the *Principles of the Law of Aggregate Litigation*, which sets forth a workable view of predominance that considerably eases the presumed friction between Rule 23(b)(3) and (c)(4). Richard Nagareda, the principal author of that section, suggested that courts should certify issue classes where resolving the 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, so as to generate significant judicial efficiencies.”<sup>175</sup> Accordingly, courts should certify classes even if aggregate treatment as to just one issue materially resolves class members’ claims.<sup>176</sup> The superiority requirement is embedded in both the “materially advance” language and, more obviously, as a condition that certifying the issue would be “superior to other realistic alternatives” such that it “generate[s] significant judicial efficiencies.”<sup>177</sup>

Oftentimes in collective litigation, resolving a core question—typically one that centers on the defendant’s conduct—can have a domino effect on all the cases. When that occurs, certifying the issue materially advances litigants’ claims. Consider a nonclass example such as a basic bus accident. Regardless of whether the bus contains two or eighty passengers, resolving fundamental questions over driver negligence or product malfunction removes eligibility components and advances the litigation; it prevents disparate questions over each passenger’s damages

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<sup>174</sup> *Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768 (2013) (remanding for further consideration in light of *Comcast Corp.*, 133 S. Ct. 1426).

<sup>175</sup> *Principles of the Law of Aggregate Litigation*, supra note 42, § 2.02(a)(1); see also *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008) (requiring issue classes to “materially advance the litigation”); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472–73 (5th Cir. 1986) (“It is difficult to imagine that class jury findings on the class questions [regarding the state-of-the-art defense] will not significantly advance the resolution of the underlying hundreds of cases.”); *Manual for Complex Litigation* § 21.24 (4th ed. 2004) (suggesting that aggregate treatment should “materially advance[] the disposition of the litigation as a whole”). Using this standard avoids what David Rosenberg has characterized as the “myopia of proceduralist analysis” by “reorient[ing] discussion towards a tort-policy perspective.” David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. Rev. 210, 214 (1996).

<sup>176</sup> See Allan Erbsen, *From “Predominance” to “Resolvability”: A New Approach to Regulating Class Actions*, 58 Vand. L. Rev. 995, 1005 (2005) (“[I]t is the lack of substantial dissimilarity that makes class actions a fair and procedurally viable means of rendering judgment for or against the class and its members.”).

<sup>177</sup> *Principles of the Law of Aggregate Litigation*, supra note 42, § 2.02(a)(1).

from undermining the judge's ability to adjudicate a core question. Otherwise, judges around the country would hear the same evidence many times—risking conflicting opinions as to the same conduct and undermining judicial efficiency. When adjudicating a common issue significantly advances the litigation, it is ripe for issue certification.<sup>178</sup> Thus, some courts have properly separated eligibility components such as plaintiffs' specific and proximate causation,<sup>179</sup> reliance, and damages<sup>180</sup> to facilitate issue classes in employment-discrimination,<sup>181</sup> environmental-contamination,<sup>182</sup> and consumer-fraud litigation.<sup>183</sup>

<sup>178</sup> *Id.* See generally *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 8:10ML2151JVS (FMOx), 2012 WL 7802852, at \*4 (C.D. Cal. Dec. 28, 2012) (“[W]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.” (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998)); *Galvan v. KDI Distrib., Inc.*, No. SACV 08-0999-JVS (ANX), 2011 WL 5116585, at \*8 (C.D. Cal. Oct. 25, 2011) (“[I]n general, predominance is met when there exists generalized evidence which proves or disproves an [issue or] element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class members’ individual position.” (quoting *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 262 (D.D.C. 2002))).

<sup>179</sup> *E.g.*, *Pella Corp. v. Saltzman*, 606 F.3d 391, 395 (7th Cir. 2010) (“[B]ut proximate cause is an individual issue and will not be addressed by the class jury. . . . Issues of causation and damages issues, such as whether that defect caused the damage to a particular window and how much the design contributed to the rot, will be handled individually.”); *De Gidio v. Perpich*, 612 F. Supp. 1383, 1386–87 (D. Minn. 1985) (“Accordingly, under Rule 23(c)(4)(A), the court will confine the class action to those issues pertaining to the alleged constitutional violation and injunctive relief. Thus individuals will be required to present evidence of causation and their particular damages separately.”).

<sup>180</sup> *E.g.*, *Smilow v. Sw. Bell Mobile Sys.*, 323 F.3d 32, 40 (1st Cir. 2003) (“The individuation of damages in consumer class actions is rarely determinative under Rule 23(b)(3). Where, as here, common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain.”); *Nieberding v. Barrette Outdoor Living, Inc.*, 302 F.R.D. 600, 618 (D. Kan. 2014) (certifying liability issues for class treatment but reserving the damages issue for a later date if plaintiffs prevail on liability); *In re Motor Fuel Temperature Sales Practices Litig.*, 292 F.R.D. 652, 674–75 (D. Kan. 2013) (certifying an issue class and noting that “[d]etermining each class members’ damages, if any, may require individualized determinations”); *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 537 (N.D. Cal. 2012) (addressing damages separately from the issue of certification).

<sup>181</sup> *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 492 (7th Cir. 2012); *Allen v. Int’l Truck & Engine Corp.*, 358 F.3d 469, 472 (7th Cir. 2004).

<sup>182</sup> *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 912 (7th Cir. 2003).

<sup>183</sup> *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 861 (6th Cir. 2013); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 798–99 (7th Cir. 2013); *Pella Corp.*, 606 F.3d at 395.

But moving from a basic bus accident—even with an alleged product defect—to manufacturing a defective product such as a drug or medical device that causes “downstream” injuries<sup>184</sup> shifts courts’ certification calculus dramatically when plaintiffs hope to certify general causation. Courts have certified conduct-related defenses to general causation such as the military contractor defense in the Agent Orange litigation and the state-of-the-art defense in asbestos,<sup>185</sup> yet they tend to eschew issue-class treatment on general causation.<sup>186</sup> Nevertheless, a similar trifurcated trial (with general causation tried first) saved substantial time in over 600 consolidated Bendectin cases.<sup>187</sup>

Although general causation focuses on the defendant’s conduct, there is a persistent stigma that certification cannot materially advance the claims’ resolution because courts must still determine eligibility components, such as specific causation and damages.<sup>188</sup> Yet, when the Fifth Circuit upheld the decision to certify the state-of-the-art defense in asbestos, it concluded:

It is difficult to imagine that class jury findings on the class questions will not significantly advance the resolution of the underlying hundreds of cases. . . . Judge Parker’s plan is clearly superior to the alternative of repeating, hundreds of times over, the litigation of the state of the art issues with, as that experienced judge says, “days of the same witnesses, exhibits and issues from trial to trial.”<sup>189</sup>

This logic holds in more recent mass-tort cases.

In the Vioxx litigation, for example, Judge Eldon Fallon conceded that Merck’s conduct components were uniform: “[C]ommon questions of fact exist regarding the development, manufacturing, and testing of Vioxx” as well as “Vioxx’s effects on the human body.”<sup>190</sup> But, citing

<sup>184</sup> Principles of the Law of Aggregate Litigation, *supra* note 42, § 2.02 cmt. a.

<sup>185</sup> *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472–473 (5th Cir. 1986) (“It is difficult to imagine that class jury findings on the class questions [regarding the state-of-the-art defense] will not significantly advance the resolution of the underlying hundreds of cases.”).

<sup>186</sup> See, e.g., *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 205 (D. Minn. 2003) (“While these claims involve common issues, they also involve individual issues such as injury, causation, the learned intermediary doctrine and comparative fault.”).

<sup>187</sup> *In re Bendectin Litig.*, 857 F.2d 290, 293–94 (6th Cir. 1988); see also *infra* notes 233–38 and accompanying text (discussing *Bendectin* and the potential benefits to defendants).

<sup>188</sup> Accuracy presents a competing concern in product liability cases, which is addressed in Subsection III.B.3.

<sup>189</sup> *Jenkins*, 782 F.2d at 472–73.

<sup>190</sup> *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 459 (E.D. La. 2006).

the Fifth Circuit's now outdated predominance test, diverse substantive laws, and the need to resolve eligibility components such as specific causation and damages, he denied certification.<sup>191</sup>

Yet, had Judge Fallon been open to grouping similar state laws or if state law had been functionally equivalent, resolving general causation in an issue class might have materially advanced the claims' resolution: Merck's deceptive marketing practices and scientific misconduct were central issues in each trial—so much so that Judge Carol Higbee bifurcated New Jersey test cases along those lines.<sup>192</sup> The first phase addressed common conduct issues such as whether Merck failed to warn patients that Vioxx posed cardiovascular risks, and the second phase addressed eligibility components like specific causation.<sup>193</sup> Thus, solving choice-of-law problems or determining whether state laws on conduct components were similar might tee up a defendant's conduct for issue class certification. Limited certification might also prove superior to nonclass alternatives, which in *Vioxx* meant incorporating coercive provisions to rope as many plaintiffs as possible into the settlement.<sup>194</sup> Accordingly, even in mass torts, courts should consider certifying conduct-related components.<sup>195</sup>

Requiring that issue classes materially advance the cases' resolution incorporates a pragmatic backstop that serves to limit even conduct components. Adjudicating a defendant's conduct collectively is beneficial only when conduct is uniform—even if it affects plaintiffs dissimilarly. For example, in *Klay v. Humana, Inc.*, the defendants “utilized many different form contracts” and “contracted with different types of care-providing entities.”<sup>196</sup> Thus, even though “[a] breach is a breach is a breach,”<sup>197</sup> a defendant's contractual obligations differed in ways that made certifying conduct components impossible.

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<sup>191</sup> *Id.* at 462–63.

<sup>192</sup> Snigdh Prakesh, *All the Justice Money Can Buy* 24–35 (2011). But see generally Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. Ill. L. Rev. 69, 79 (contending that “[m]ass trials on the issue of ‘general’ causation create substantial savings only when plaintiffs lose because this leads immediately to the dismissal of large numbers of mass tort claims”).

<sup>193</sup> Prakesh, *supra* note 192, at 24–35.

<sup>194</sup> *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 558 (E.D. La. 2009).

<sup>195</sup> Campos, *supra* note 88, at 1068–69, 1072.

<sup>196</sup> 382 F.3d 1241, 1263 (11th Cir. 2004), abrogated in part on other grounds by *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008).

<sup>197</sup> *Id.* at 1263.

## 2. Choice of Law

When state law governs a defendant's conduct, choice-of-law questions can complicate issue classes. Nevertheless, the need for state law alone should not signal that issue classes are inappropriate. There are several circumstances in which choosing the applicable law need not pose a barrier.

First, as in some contractual warranty cases, a single state's law may apply across the board.<sup>198</sup> Second, certain forum states' choice-of-law rules may dictate that one state's law should apply to the entire class. For example, the Oklahoma Supreme Court applied Michigan law to a nationwide breach-of-warranty class action against DaimlerChrysler because the defendant made its "decisions concerning the design, manufacture, and distribution" there and "Michigan is the only state where conduct relevant to all class members occurred."<sup>199</sup> Third, the substantive law may not vary from state to state, and thus may create no conflict.<sup>200</sup> When this is the case, the forum can apply a single law to all class members, and typically selects its own state law.<sup>201</sup>

<sup>198</sup> See, e.g., *In re Detwiler*, 305 F. App'x 353, 355 (9th Cir. 2008) (applying a contractual choice-of-law provision specifying that Florida law must govern); Principles of the Law of Aggregate Litigation, supra note 42, § 2.05(b)(1).

<sup>199</sup> *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618, 626 (Okla. 2003); see also *Int'l Union of Operating Eng'rs v. Merck & Co.*, No. ATL-L-3015-03, 2005 WL 2205341, at \*1, \*5 (N.J. Super. Ct. Law Div. July 29, 2005) (certifying a nationwide class of third-party payors in the *Vioxx* litigation by applying New Jersey law). Under *Klaxon Co. v. Stentor Electric Manufacturing Co.*, a federal court sitting in Oklahoma would have to apply Oklahoma's choice-of-law provision, suggesting that the same outcome could result in federal court. 313 U.S. 487, 496 (1941). Of course, a defendant's principal place of business emerges as a common feature only by virtue of the class device; in individual litigation, it would stand out no more than where the plaintiff purchased the car. Richard A. Nagareda, *Bootstrapping in Choice of Law After the Class Action Fairness Act*, 74 UMKC L. Rev. 661, 673 (2005).

<sup>200</sup> Principles of the Law of Aggregate Litigation, supra note 42, § 2.05(b)(2); see, e.g., *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 127 (2d Cir. 2013) ("As courts have noted, state contract law defines breach consistently such that the question will usually be the same in all jurisdictions."); *Klay*, 382 F.3d at 1263 ("A breach is a breach is a breach . . ."); accord *Am. Airlines v. Wolens*, 513 U.S. 219, 233 n.8 (1995) ("[C]ontract law is not at its core 'diverse, nonuniform, and confusing.'"); *In re Digitek Prods. Liab. Litig.*, No. 2:08-md-01968, 2010 WL 2102330, at \*6 (W.D. Va. May 25, 2010) ("Step one [of the Restatement (Second) of Conflict of Laws] involves analyzing if 'an actual conflict exists . . .' If no conflict exists, then I can just apply a single set of laws to the entire class' claims.").

<sup>201</sup> *In re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46, 56 (D.N.J. 2009), opinion clarified by 267 F.R.D. 113, 115 (D.N.J. 2010), opinion modified on reconsideration by No. 07-2720 (DRD), 2010 WL 2976496, at \*15-16 (D.N.J. July 22, 2010) (applying New Jersey's choice-of-law rules to a consumer fraud class and deciding that New Jersey law

Even when state laws vary, plaintiffs' attorneys may be able to place them into a few categories such that an issue class could adjudicate common conduct components across a particular group.<sup>202</sup> As one noted conflicts scholar explained, "while in theory all fifty states could have different laws, in practice there are seldom more than two or three rules on any given question, each adopted by many states."<sup>203</sup> And those differences principally arise with regard to eligibility components. In product liability laws, for example, states differ most over comparative fault and statutes of limitation,<sup>204</sup> not a defendant's conduct.<sup>205</sup> Even though

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would apply because it had the greatest interest). While a general presumption in favor of applying forum law exists, state courts have split over whether that presumption applies in class actions. Compare *Ferrell v. Allstate Ins. Co.*, 188 P.3d 1156, 1163–64 (N.M. 2008) ("If the defendant fails to bring any 'clearly established contradictory law' to the court's attention, the district court cannot be faulted if it concludes that the laws of the jurisdiction . . . do not conflict such that a single state's law may be applied to the entire class."), and *Wash. Mut. Bank v. Superior Court*, 15 P.3d 1071, 1081–82 (Cal. 2001) (presuming that forum law should apply), with *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 672 (Tex. 2004) (conflating the choice-of-law burden with plaintiffs' certification burden), and *Dragon v. Vanguard Indus.*, 89 P.3d 908, 918 (Kan. 2004) (requiring the class proponent to show that there are no significant differences in states' law).

<sup>202</sup> Principles of the Law of Aggregate Litigation, *supra* note 42, § 2.05(b)(3); see, e.g., *Pella Corp. v. Saltzman*, 606 F.3d 391, 396 (7th Cir. 2010) (certifying "six state subclasses demonstrates that the district court carefully considered how the case would proceed, explicitly finding that the consumer protection acts of these six states have nearly identical elements"); *In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283, 315 (3d Cir. 1998) (expressing a willingness "to certify nationwide classes on the ground that relatively minor differences in state law could be overcome at trial by grouping similar state laws together and applying them as a unit"); *In re Sch. Asbestos Litig.*, 789 F.2d 996, 998–1000 (3d Cir. 1986) (certifying nationwide classes with four subgroups based on state law differences); see also *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) (expressing no view on whether remanded consumer protection claims could be grouped into smaller classes).

<sup>203</sup> Larry Kramer, *Choice of Law in American Courts in 1990: Trends and Developments*, 39 *Am. J. Comp. L.* 465, 475 (1991).

<sup>204</sup> Statutes of limitations vary based on length, tolling periods, injuries suffered, and types of claim. E.g., *La. Civil Code Ann. art. 3492* (2014) (tolling one year from the date of injury); *Mo. Rev. Stat. § 516.120(4)* (2014) (allowing five years for claims involving personal injury or property damage). And states differ substantially on how a plaintiff's fault affects recovery. Compare *Norfolk S. Ry. Co. v. Johnson*, 75 So. 3d 624, 645 (Ala. 2011) (barring recovery for plaintiffs who are contributorily negligent), with *Keogh v. W.R. Grasle, Inc.*, 816 P.2d 1343, 1351 (Alaska 1991) (using comparative fault for products liability), *Utah Code Ann. §§ 78B-5-817 to -823* (LexisNexis 2014) (same), and *Ark. Code Ann. § 16-55-216* (2014) (using modified comparative fault that allows plaintiffs to recover so long as fault is less than fifty percent).

<sup>205</sup> When determining whether a defendant created a defective product, most states have adopted either a consumer-expectancy test or risk-benefit analysis, with some states adopting both as potential ways to prove a product defect. Even states that have adopted a single method take the other method into account. See, e.g., *Flemister v. Gen. Motors Corp.*, 723

this approach can pose the most hurdles in terms of collecting and clustering statutes, common law, and jury instructions, that undertaking becomes part of plaintiffs' burden only once the court concludes that the forum state's law differs from other states' laws (as opposed to a "false conflict").<sup>206</sup> Only then does the party seeking to certify a class have the burden of proving that states' laws fall into limited patterns that courts can adjudicate collectively.<sup>207</sup> As the next Subsection explains, crafting an adjudication plan could aid parties in meeting this burden.

### 3. "Ascertainability" and Precision

Issue classes further aggregation's goals of enforcing substantive rights, promoting efficiency, ensuring finality, and encouraging accuracy and consistency through issue preclusion.<sup>208</sup> Although preclusion doctrines vary by state, most explain that where the first lawsuit actually litigates and determines the same issue with a valid, final judgment, that suit prevents subsequent cases from relitigating the issue so long as it was essential to the first judgment.<sup>209</sup> Some states add a mutuality component, which requires subsequent suits to involve the same parties or their privies as the first one.<sup>210</sup> But most states permit nonmutual issue

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So. 2d 25, 28 (Ala. 1998) (applying a risk-utility test while considering consumer expectations); *Potter v. Chi. Pneumatic Tool Co.*, 694 A.2d 1319, 1333 (Conn. 1997) (adopting a modified consumer-expectations test that also considers the product's risk and the feasibility of an alternative design). Only a few states have chosen one test while rejecting the other as a factor to consider. See, e.g., *Agrofollajes, S.A. v. E.I. Du Pont de Nemours & Co.*, 48 So. 3d 976, 997 (Fla. Dist. Ct. App. 2010) (adopting a risk-utility test); *Rahmig v. Mosley Mach. Co.*, 412 N.W.2d 56, 69–70 (Neb. 1987) (using the consumer-expectations test); *Sims v. Gen. Motors Corp.*, 751 P.2d 357, 365 (Wyo. 1988) (adopting the consumer-expectations test).

<sup>206</sup> The Constitution permits courts to presume that their forum law applies in deciding whether the forum state's law differs from those of other states with a connection to the plaintiffs' claim. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988).

<sup>207</sup> Patrick Woolley, *Choice of Law and the Protection of Class Members in Class Suits Certified Under Federal Rule of Civil Procedure 23(b)(3)*, 2004 Mich. St. L. Rev. 799, 811; Patrick Woolley, *Erie and Choice of Law After the Class Action Fairness Act*, 80 Tul. L. Rev. 1723, 1741 (2006).

<sup>208</sup> See *Principles of the Law of Aggregate Litigation*, supra note 42, § 1.03 (enumerating aggregation goals).

<sup>209</sup> Restatement (Second) of Judgments § 27 (1982).

<sup>210</sup> States requiring mutuality include Alabama, Alaska, Florida, Georgia, Kansas, Louisiana, Mississippi, North Dakota, and Virginia. Steven P. Nonkes, Note, *Reducing the Unfair Effects of Nonmutual Issue Preclusion Through Damages Limits*, 94 Cornell L. Rev. 1459, 1468 n.60 (2009) (citing cases); see, e.g., *Sosebee v. Steadfast Ins. Co.*, 701 F.3d 1012, 1026 (5th Cir. 2012) ("Unlike the federal issue preclusion rules, Louisiana still requires mutuality

preclusion so long as it comports with due process requirements.<sup>211</sup> Consequently, when courts certify issue classes, they must: (1) specify precisely which issues are certified, litigated, and determined; and (2) in diversity cases governed by state law, define the class members with care so that states with mutuality requirements can readily assess whether the plaintiff was “in privity with” the class representative in the first suit.

Beginning with the first concern over specificity, creating an adjudication plan that contemplates *Daubert* motions, summary judgment motions, and special verdict forms<sup>212</sup> can benefit both certifying courts and subsequent courts faced with preclusion questions.<sup>213</sup> If the initial parties have trouble delineating the issue or issues to be certified, that serves as a substantial warning sign that certification is inappropriate. Conversely, adjudication plans that concretely demonstrate how aggregate treatment materially resolves the claims can enhance the credibility of class certification motions.<sup>214</sup> And, even though courts cannot predetermine the res

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for issue preclusion.”); *State ex rel. Moore v. Molpus*, 578 So. 2d 624, 640 (Miss. 1991) (“A final decision of an issue on its merits is normally thought preclusive only if there is an identity of parties from one suit to the next, and of their capacities as well. Privity, succession in interest, and relationship are terms used to express these identities.”).

<sup>211</sup> See Nonkes, *supra* note 210, at 1467–68 (“Today, most states have abandoned mutuality for both defensive and offensive applications of collateral estoppel. A sizeable minority, however, retain the traditional mutuality requirement. Still others allow only defensive use of nonmutual collateral estoppel.”). States that do not require mutuality for offensive or defensive issue preclusion include Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Maine, Massachusetts, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, South Carolina, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* at 1467 n.59 (citing cases from each jurisdiction). Kentucky and Massachusetts allow offensive nonmutual issue preclusion. *Moore v. Commonwealth of Ky., Cabinet for Human Res.*, 954 S.W.2d 317, 318–19 (Ky. 1997); *Coastal Oil New Eng., Inc. v. Citizens Fuels Corp.*, 769 N.E.2d 309, 312 (Mass. App. Ct. 2002). Finally, states permitting only defensive use of nonmutual issue preclusion include Ohio, Iowa, Maryland, Michigan, North Carolina, and Tennessee. Nonkes, *supra* note 210, at 1468 n.61 (citing cases). Federal courts assessing federal causes of action do not require mutuality for offensive or defensive issue preclusion. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979) (permitting offensive nonmutual issue preclusion); *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350 (1971) (permitting defensive nonmutual issue preclusion).

<sup>212</sup> See Fed. R. Civ. P. 49(a)(2) (requiring courts to instruct and explain issues to the jury).

<sup>213</sup> Principles of the Law of Aggregate Litigation, *supra* note 42, § 2.12.

<sup>214</sup> See, e.g., *Pella Corp. v. Saltzman*, 606 F.3d 391, 396 (7th Cir. 2010) (“Plaintiffs point out that they submitted a sample trial plan with a comparative legal analysis of each subclass state, suggestions of how the case could be tried in phases, and a statement of class structure and remedies.”).

judicata effect of their own judgments,<sup>215</sup> forcing parties to contemplate the certified issue from a “same issue”<sup>216</sup> standpoint can sharpen their focus and help them unravel certification’s practical consequences on subsequent cases.<sup>217</sup>

*Engle v. Liggett Group, Inc.*<sup>218</sup> provides a textbook example of the perils of imprecision: The Florida Supreme Court decertified a class-wide trial that awarded \$145 billion in punitive damages to Florida smokers, but allowed some of the jury’s factual determinations to stand so that class members could avoid relitigating those issues in individual trials.<sup>219</sup> But the initial trial court never intended to conduct an issue class, so the class-wide findings were imprecise. In *Engle*’s aftermath, the parties fought vigorously over what the jury had actually determined.<sup>220</sup> Consequently, courts certifying issue classes should take great

<sup>215</sup> *Coleman v. Gen. Motors Acceptance Corp.*, 220 F.R.D. 64, 80 (M.D. Tenn. 2004) (“Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the res judicata effect of the judgment; this can be tested only in a subsequent action.” (quoting Fed. R. Civ. P. 23(c)(3), advisory committee’s note)).

<sup>216</sup> Restatement (Second) of Judgments § 27 cmt. c (1982) (listing factors to consider in deciding whether an issue is the same).

<sup>217</sup> Principles of the Law of Aggregate Litigation, *supra* note 42, § 2.12 cmt. b. This eases the court’s subsequent obligation under Rule 23(c)(1)(B), which requires the court to define the “class *and* the class claims, issues, or defenses” (emphasis added). Rule 23(c)(1)(B) “means that the text of the order or an incorporated opinion must include (1) a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis.” *Wachtel v. Guardian Life Ins. Co.*, 453 F.3d 179, 185, 187–88 (3d Cir. 2006). In *Gates v. Rohm and Haas Co.*, the Third Circuit specified that its interpretation in *Wachtel* applied to issue classes. 655 F.3d 255, 273–74 (3d Cir. 2011). The Third Circuit’s test has gained traction in other circuits. E.g., *Ross v. RBS Citizens, N.A.*, 667 F.3d 900, 904–05 (7th Cir. 2012), vacated on other grounds, 133 S. Ct. 1722 (2013); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 38–41 (1st Cir. 2009); *Gregurek v. United of Omaha Life Ins. Co.*, No. CV 05-6067-GHK (FMOx), 2009 WL 4723137, at \*3 (C.D. Cal. Nov. 10, 2009).

<sup>218</sup> 945 So. 2d 1246 (Fla. 2006).

<sup>219</sup> *Id.* at 1269.

<sup>220</sup> *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1334–35 (11th Cir. 2010). The U.S. Supreme Court has denied several petitions from R.J. Reynolds to consider whether affording issue preclusive effect violated the Due Process Clause. *R.J. Reynolds Tobacco Co. v. Clay*, 133 S. Ct. 650 (2012) (denying certiorari); Martina S. Barash, *Supreme Court Again Takes a Pass on Reviewing Engle’s Preclusive Effect*, *Class Action Litig. Rep. (BNA)* 1 (June 13, 2014) (“Tobacco companies failed for the ninth time June 9 to get the U.S. Supreme Court to review the constitutionality of reusing jury findings from a decertified Florida tobacco class action in individual suits.”). The Florida Supreme Court reaffirmed its deci-

care to explain their summary judgment opinions and craft special verdict forms to minimize preclusion challenges.

As to the second concern, if a subsequent court requires mutuality, it must be able to easily determine who was a class member and is thus entitled to assert issue preclusion. To identify the class and meet standing requirements, plaintiffs' lawyers have defined members in terms of people harmed by the defendant's conduct, employed subjective and objective criteria, and invoked criteria dependent on the merits.<sup>221</sup>

But these myriad approaches have prompted frequent objections and some circuits have allowed defendants to turn this straightforward assessment into an impossibly high "ascertainability" standard.<sup>222</sup> For example, defendants invoke the lack of "ascertainability" as a rationale against certifying small-claims consumer classes whose members are inherently difficult to identify.<sup>223</sup> Other objections are the converse of one another: the class is overly broad because it includes both injured and uninjured members,<sup>224</sup> or the class is a "fail-safe" class based on the defendant's wrongdoing because it requires establishing liability before determining membership.<sup>225</sup>

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sion to allow issue preclusion in *Engle* progeny cases in 2013. *Philip Morris USA v. Douglas*, 110 So. 3d 419, 428 (Fla. 2013).

<sup>221</sup> Plaintiffs' attorneys often revise their class definition after receiving class discovery from defendants, and should be given latitude to do so. But see *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007) ("Where it is facially apparent from the pleadings that there is no ascertainable class, a district court may dismiss the class allegation on the pleadings."); *In re Vioxx Prod. Liab. Litig.*, MDL No. 1657, 2008 WL 4681368, at \*10 (E.D. La. Oct. 21, 2008) (noting that lack of ascertainability "alone is sufficient to warrant striking the Plaintiffs' class allegations on the pleadings").

<sup>222</sup> See Fed. R. Civ. P. 23(c)(1)(B) ("An order that certifies a class action must define the class and the class claims, issues, or defenses . . .").

<sup>223</sup> Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DePaul L. Rev. 305, 308 (2010).

<sup>224</sup> E.g., *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006); see also Brief in Opposition of Petition for Writs of Certiorari at 1, *Whirlpool Corp. v. Butler*, 134 S. Ct. 1277 (2014) (Nos. 13-430, 13-431) ("The questions presented turn on the assertion that 'most members have never experienced the alleged defect,' and that, accordingly, painstaking individual inquiries would doom any class resolution of these cases.").

<sup>225</sup> For more information on fail-safe classes, compare John Beisner et al., *Ascertainability: Reading Between the Lines of Rule 23, Class Action Litig. Rep. (BNA)* 253 (Mar. 25, 2011) (arguing in favor of ascertainability challenges and against the viability of fail-safe classes), and Erin L. Geller, Note, *The Fail-Safe Class As an Independent Bar to Class Certification*, 81 *Fordham L. Rev.* 2769, 2769 (2013) (suggesting fail-safe classes should not be certified), with *Astiana v. Kashi Co.*, 291 F.R.D. 493, 500 (S.D. Cal. 2013) ("If class actions could be defeated because membership was difficult to ascertain at the class certification stage, 'there would be no such thing as a consumer class action.'"), and *Ries v. Ariz. Beverages USA*,

The basic premise behind each of these objections is the same—at some point, class definitions will turn on plaintiffs’ eligibility for relief. The more harm-based definitions incorporate subjective eligibility components, the more difficult certification becomes. For instance, the medical monitoring class in the failed *Castano* litigation included “all nicotine dependent persons in the United States,”<sup>226</sup> whereas the *Donovan* class successfully defined members as those with lung cancer who had a twenty pack-year smoking history.<sup>227</sup> While both rely on plaintiffs’ eligibility, nicotine dependence entails a subjective inquiry; evidence of smoking history and a lung-cancer diagnosis does not.

Considering the class definition as an extension of conduct-related components and eligibility components could alleviate some of the premature “ascertainability” objections when a class is certified only as to conduct issues. What defendants cast as an unascertainable class is often a function of injecting eligibility components into the class definition and improperly commingling standing requirements with predominance concerns.<sup>228</sup> Thus, certifying an issue class based on a defendant’s conduct and defining members as those harmed by that conduct should be permissible so long as eligibility components become objectively verifiable or subject to a cy pres remedy in subsequent proceedings.<sup>229</sup> For example, had the *Donovan* court not certified a plenary tobacco class, invoking preclusion on conduct issues in follow-on proceedings would have been straightforward: Produce an affidavit as to a plaintiff’s number of pack-years and a lung-cancer diagnosis. If the certifying court is the same one trying follow-on proceedings, then the judge will be able

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287 F.R.D. 523, 536 (N.D. Cal. 2012) (same), and Daniel Luks, Note, Ascertainability in the Third Circuit: Name That Class Member, 82 Fordham L. Rev. 2359 (2014) (suggesting that not accepting fail-safe classes would eviscerate consumer class actions).

<sup>226</sup> *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 738 (5th Cir. 1996).

<sup>227</sup> *Donovan v. Philip Morris USA*, 268 F.R.D. 1, 9 (D. Mass. 2010) (“Class members can sign affidavits under penalty of perjury or submit doctors’ letters to detail their smoking histories and medical status.”).

<sup>228</sup> E.g., *Romberio v. UnumProvident Corp.*, 385 F. App’x 423, 429–31 (6th Cir. 2009) (denying class certification in part because determining who was in the class would require “individualized fact-finding”); see also *In re Fosamax Prods. Liab. Litig.*, 248 F.R.D. 389, 397 (S.D.N.Y. 2008) (“[C]lass membership is not feasibly ascertainable where it hinges on myriad medical factors individual to each class member.”).

<sup>229</sup> See Principles of the Law of Aggregate Litigation, *supra* note 42, § 3.07(c) (suggesting that when courts find that individual distributions to class members are not possible, parties should “identify a recipient whose interests reasonably approximate those being pursued by the class”).

to identify class members later, which is all that courts should require.<sup>230</sup> In multidistrict litigation, however, transferee judges should take special care to ensure that class members are objectively identifiable so that transferor judges can easily assess who is entitled to assert the issue class's preclusive effect on remand.

### *B. The Myth of Jackpot Justice*

Issue classes are controversial for both plaintiffs' and defense attorneys.<sup>231</sup> Although they are often thought to benefit plaintiffs by "black-mailing" defendants into settling, in practice, issue classes are double-edged swords. Even when a defendant brings all its resources to bear on summary judgment motions or bellwether trials, that strategy works only by dissuading plaintiffs' attorneys to abandon their clients' claims; it does nothing to systematically prevent further suits.<sup>232</sup> But an issue class gives the defendant a rare opportunity to stymie further claims through preclusion—something nonclass litigation cannot do.<sup>233</sup>

If the defendant is confident that it has done nothing wrong or that the plaintiffs' evidence on conduct is weak, an issue class can undercut

<sup>230</sup> See, e.g., *Bush v. Calloway Consol. Grp. River City, Inc.*, No. 3:10-cv-841-J-37MCR, 2012 WL 1016871, at \*4 (M.D. Fla. Mar. 26, 2012) ("Class members need not actually be ascertained prior to certification, but each individual's class membership must be ascertainable at some stage in the proceeding."); *Boundas v. Abercrombie & Fitch Stores*, 280 F.R.D. 408, 417 (N.D. Ill. 2012) ("It is enough that the class be ascertainable . . . [Class members who threw gift cards away] will be required to submit an appropriate affidavit, which can be evaluated during the claims administration process if [plaintiff] prevails at trial."); *Spagnola v. Chubb Corp.*, 264 F.R.D. 76, 97 (S.D.N.Y. 2010) ("While class members need not actually be ascertained prior to certification, they must be ascertainable at some stage of the proceeding."); *Mazur v. eBay Inc.*, 257 F.R.D. 563, 567 (N.D. Cal. 2009) (same); Newberg on Class Actions § 3.3 (5th ed. 2014) ("[T]he court need not know the identity of each class member before certification; ascertainability requires only that the court be able to identify class members at some stage of the proceeding."). But see *Hayes v. Wal-Mart Stores*, 725 F.3d 349, 356 (3d Cir. 2013) ("[C]lass certification will founder if the only proof of class membership is the say-so of putative class members or if ascertaining the class requires extensive and individualized fact-finding.").

<sup>231</sup> Because of this, commentators have been skeptical about issue classes' utility. See, e.g., Jessie Kokrda Kamens, Beisner, Cabraser Weigh *Comcast's* Impact; Flesh Out Typicality, Rise of Ascertainability, *Class Action Litig. Rep.* (BNA) 520 (May 9, 2014) ("Beisner said Rule 23(c)(4) won't be used much because it basically has class proponents going through the expensive process of trial, and perhaps getting a liability determination, but there is no compensation for class members at the end.").

<sup>232</sup> See *Taylor v. Sturgell*, 553 U.S. 880, 904 (2008) (disapproving preclusion through virtual representation).

<sup>233</sup> *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979).

thousands of absent plaintiffs' cases in a single trial just as bifurcating liability does in mass joinder.<sup>234</sup> In the Bendectin litigation, for instance, the court used a trifurcated trial to test general causation first.<sup>235</sup> When jurors found for the defendant, they extinguished 1,100 plaintiffs' cases in a single twenty-two-day trial.<sup>236</sup> Issue classes can also prevent defeats in unusually sympathetic plaintiffs' cases from precluding relitigation across the board.<sup>237</sup> The danger, however, is that issue classes eliminate outcome variability and increase the number of claims brought into the system, thereby leading to so-called "jackpot justice."<sup>238</sup>

The issue class is controversial for plaintiffs' attorneys, too, because it vests initial litigation control in the hands of a few attorneys and, even following a win, class counsel may face additional hurdles before receiving fees. Still, by designating class counsel, courts delineate a property right in the ultimate recovery in a way that nonclass, multidistrict litigation does not.<sup>239</sup> Plus, Rule 23 requires judges to make specific findings regarding adequate representation, which has not occurred when appointing lead lawyers in multidistrict litigation.<sup>240</sup> Nevertheless, when damages are substantial, the issue class has the potential to foreclose subsequent litigation and wrest lucrative fees from nonclass counsel. The following subsections consider these controversies, propose a method for addressing attorneys' fees, and urge courts to make interlocutory appeals on the merits available after trying an issue class.

### *1. Incentivizing Issue Classes with Attorneys' Fees*

Plaintiffs' attorneys create and fund class actions. Thus, invigorating issue classes requires incentivizing the plaintiffs' bar. And, as is true for most attorneys, money motivates. But issue classes are uniquely situated

<sup>234</sup> A recent and rare issue class action trial took place in Ohio over moldy washing machines; the defendants won, precluding Ohio residents from relitigating the question. Perry Cooper, *Ohio Moldy Washer Verdict Goes to Whirlpool; Class Will Pursue Claims in Other States*, *Class Action Litig. Rep. (BNA)* 1265 (Nov. 14, 2014).

<sup>235</sup> *In re Bendectin Litig.*, 857 F.2d 290, 296 (6th Cir. 1988).

<sup>236</sup> *Id.* at 293.

<sup>237</sup> Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 *Iowa L. Rev.* 499, 535 (1998).

<sup>238</sup> E.g., Byron G. Stier, *Jackpot Justice: Verdict Variability and the Mass Tort Class Action*, 80 *Temp. L. Rev.* 1013, 1015 (2007).

<sup>239</sup> See generally Edward Brunet, *Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 *Tul. L. Rev.* 1919, 1930 (2000) ("The presence of multiple competing attorneys creates the lack of a clear property right in recovery.").

<sup>240</sup> Burch, *supra* note 1, at 88.

because they do not immediately produce a common fund from which successful class counsel can recover.

In plenary classes, restitution theories justify class counsel's fee: A class member who benefits from a class settlement will be unjustly enriched at counsel's expense unless counsel receives a reasonable fee.<sup>241</sup> Similarly, in issue classes, counsel confers a substantial benefit on class members by successfully advancing the litigation.<sup>242</sup> But there's a catch—the common-fund doctrine typically requires a fund that “consists of money or other property” before class members are required to contribute to the attorney's costs of securing that fund.<sup>243</sup>

For many issue classes, establishing a common fund after a successful class-wide trial on the defendant's conduct will be a nonissue. Once they survive dispositive motions and become certified classes, many will settle collectively in the same court and thereby create a common fund.<sup>244</sup>

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<sup>241</sup> See *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (“The common-fund doctrine reflects the traditional practice in courts of equity . . . and it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees.”); Restatement (Third) of Restitution and Unjust Enrichment § 29 cmt. c (2011) (“Class counsel assumes for this purpose the role of restitution claimant; the restitution claim is asserted by the counsel against the class. Counsel asserts that the class will be unjustly enriched, at counsel's expense, unless a reasonable fee is awarded from the common fund.”); Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 *Cornell L. Rev.* 656, 663–66 (1991).

<sup>242</sup> Principles of the Law of Aggregate Litigation, *supra* note 42, § 2.09 cmt. c (“The lawyers in the aggregate proceeding will have conferred a substantial benefit on claimants insofar as that preclusive effect, in a given instance, inures to their advantage in other proceedings.”).

<sup>243</sup> Restatement (Third) of Restitution and Unjust Enrichment § 29(1) cmt. a (2011); Alan Hirsch & Diane Sheehey, *Fed. Judicial Ctr., Awarding Attorneys' Fees and Managing Fee Litigation* 61 (2d ed. 2005). There have been cases where the attorney's efforts did not bring the fund into creation, but preserved or enhanced the fund, reapportioned or distributed the fund, or even forced the defendant to take remedial action that moots the litigation. See, e.g., *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 167 (1939) (allowing a successful plaintiff who only indirectly established others' rights to a trust fund to recover fees); *Koppel v. Wien*, 743 F.2d 129, 135 (2d Cir. 1984) (permitting fees even where “no judgment or consent decree was entered and the complaint was dismissed as moot”); *Reiser v. Del Monte Props. Co.*, 605 F.2d 1135, 1139 (9th Cir. 1979) (noting that fees are still possible even where a defendant voluntarily acts in a way that favors plaintiff but moots the suit); *Abbott, Puller & Myers v. Peyser*, 124 F.2d 524, 525 (D.C. Cir. 1941) (declining to apply the common fund doctrine to the case because the plaintiff did not “create, enhance, preserve, or protect [a] fund”).

<sup>244</sup> As Section II.C discussed, however, a subsequent settlement class would require a separate certification analysis.

Common funds have materialized in high-profile issue class successes and failures such as *Engle* and the blood products litigation.<sup>245</sup>

In the original *Engle* litigation, tobacco company defendants could not afford to post a traditional bond to appeal the \$145 billion class judgment against them, so class counsel negotiated a \$600 million “bond” that would be distributed to the class even if the appeal failed.<sup>246</sup> The Florida Supreme Court decertified the *Engle* class on appeal, but let the class-wide trial’s issue-preclusive effect as to the companies’ conduct stand, which benefitted class members who pursued individual claims. Once the judge decided to disburse the “bond” (which grew to \$800 million with interest), he awarded class attorneys \$218 million in fees for creating the fund and establishing “multiple findings to be given res judicata effect in individually filed lawsuits,”<sup>247</sup> even though counsel waived claims for additional fees from the preclusive effect of their work.<sup>248</sup> Likewise, after the Seventh Circuit reversed issue certification on the defendants’ negligence and breach of duty in the hemophiliacs’ HIV litigation against pharmaceutical companies,<sup>249</sup> the defendants negotiated a settlement class action that set aside \$40 million for attorneys’ fees and costs.<sup>250</sup> Thus, when a common fund exists and the certifying

<sup>245</sup> *Infra* notes 246–51 and accompanying text.

<sup>246</sup> Curt Anderson, Florida Smokers to Split \$600M Tobacco Fund, Fla. Times-Union (Apr. 21, 2008, 12:30 PM), <http://jacksonville.com/apnews/stories/042108/D906BNHO0.shtml>; Douglas Hanks, Anti-Tobacco Lawyers Awarded \$218 Million Fee, Miami Herald, Apr. 17, 2008, at 1C (“An appeals court overturned the verdict, but not before tobacco companies put up about \$700 million to benefit class members even if the Rosenblatts lost the case.”); E-mail from Stanley Rosenblatt, Howard Engle’s attorney, to author (Sept. 11, 2014, 2:33 PM EDT) [hereinafter Rosenblatt E-mail] (on file with author).

<sup>247</sup> *Engle v. RJ Reynolds Tobacco Co.*, No. 94-08273 (Fl. Cir. Ct. Apr. 18, 2008) (order granting petition of class counsel for attorneys’ fees) (on file with author); see also Billy Shields, Attorneys Awarded \$218 Million for Work in Overturned Smokers’ Class Action That Laid Groundwork for Other Suits, Daily Rep. (Apr. 16, 2008), <http://www.dailyreportonline.com/id=900005561391/Attorneys-Awarded-218-Million-for-Work-in-Overturned-Smokers-Class-Action-That-Laid-Groundwork-for-Other-Suits?slreturn=20150825122511> (detailing the history and the process that led to the fee award).

<sup>248</sup> Rosenblatt E-mail, *supra* note 246 (“Our fee was paid from the guaranteed portion of the appeal bonds and all class members received an allocation from the fund. We were urged by trial lawyers to also take a percentage of the fees from lawyers benefitting from our work through the binding findings. However, we waived any claims for additional fees.”).

<sup>249</sup> *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

<sup>250</sup> Hensler et al., *supra* note 83, at 304–06. Dissatisfied with this amount, which was far less than the \$310 million they might have received based on their retainer agreements, several plaintiffs’ attorneys tried to enforce their contingent fees by asserting a lien on their clients’ settlement proceeds. *In re Factor VII or IX Concentrate Blood Prods. Litig.*, 159 F.3d

court retains jurisdiction over that fund, class attorneys' fees can proceed conventionally.<sup>251</sup>

There is, however, little to no precedent for awarding fees once counsel successfully litigates an issue class in multidistrict litigation and the remaining issues must be remanded.<sup>252</sup> Even if remanded cases settle or end in a favorable judgment, there may be no common fund. Multiple attorneys compound the complications: While class counsel will have contributed to the outcome with issue preclusion, a plaintiff may have a different attorney who litigates her case in the transferor court, which raises questions about fee splitting.

Nevertheless, one need not invent a theory out of whole cloth; charging liens and the common-benefit doctrine provide sound analogies for fashioning a coherent path forward. In most states, charging liens permit attorneys to assert liens against a client's cause of action when they invest labor and resources into the client's case and produce a successful judgment or settlement.<sup>253</sup> The lien attaches upon filing the initial case and accompanies the claim through judgment. Translated into the issue-class context, filing the class complaint (the cause of action) would trigger class counsel's lien if counsel successfully litigated the issue, the is-

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1016, 1018 (7th Cir. 1998). But Judge Grady, affirmed by the Seventh Circuit, enjoined the attorneys from asserting liens that contradicted and undermined the settlement agreement. *Id.* at 1019.

<sup>251</sup> See generally *Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 252 (7th Cir. 1988) (noting that the common-fund doctrine is based on the idea that those who benefit from litigation should share in its costs).

<sup>252</sup> The *Principles* suggest that issue classes might "more closely approximate restitutionary principles" than the infamous "quasi-class action," but noted that "best practices have yet to crystallize in real-world practice." *Principles of the Law of Aggregate Litigation*, supra note 42, § 2.09, reporter's notes on cmt. c. Since that time, I have proposed best practices for fee allocations in multidistrict litigation. Burch, supra note 1, at 118–23.

<sup>253</sup> E.g., *Froelich v. Graham*, 80 S.W.3d 360, 363 (Ark. 2002); *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom*, 428 So. 2d 1383, 1384–85 (Fla. 1983); *In re Estate of Estes*, 731 S.E.2d 73, 74–75 (Ga. Ct. App. 2012); *Consol. Constr. Servs., Inc. v. Simpson*, 813 A.2d 260, 275 (Md. 2002); *Mahesh v. Mills*, 602 N.W.2d 618, 620 (Mich. Ct. App. 1999); *St. Cloud Nat'l Bank & Trust Co. v. Brutger*, 488 N.W.2d 852, 855 (Minn. Ct. App. 1992); *Musikoff v. Jay Parrino's The Mint, LLC*, 796 A.2d 866, 869–70 (N.J. 2002) ("An attorney's statutory lien attaches broadly to any verdict, report, decision, award, judgment or final order in his [or her] client's favor, and the proceeds thereof in whosoever hands they may come." (internal quotation marks omitted)); *Estate of Dresner v. State*, 242 A.D.2d 627, 627 (N.Y. App. Div. 1997); *Rachel M. Kane, Attorneys at Law*, 7 Am. Jur. § 318 (2d ed. 2014); 7A *Rachel Kane et al., Corpus Juris Secundum* § 446 (2014); 2 *Robert L. Rossi, Attorneys' Fees* § 12:13 (3d ed. 2014); cf. *Rangel v. Save Mart, Inc.*, 142 P.3d 983, 989 (N.M. Ct. App. 2006) (permitting a charging lien when "an attorney makes significant contributions to a case before being discharged").

sue class inured to the plaintiff's benefit through preclusion, and that the plaintiff ultimately received a favorable judgment or settlement award.<sup>254</sup> The court conducting the follow-on proceedings could then apportion fees to class counsel and individual counsel based on quantum-meruit principles.<sup>255</sup>

Using charging liens to compensate issue-class counsel in multidistrict litigation can, however, present some limitations. First, when subsequent courts have jurisdiction to apportion fees, transferor judges may be less familiar with class counsel's effort and fees will lack uniformity.<sup>256</sup> Before remanding cases, transferee judges might quell this fear, in part, by identifying likely fee-splitting scenarios and assigning fee percentages to those categories (settlement immediately upon remand versus a subsequent trial on eligibility components, for example).<sup>257</sup> Encompassing expected fees in an order triggers the law-of-the-case doctrine, which suggests transferor judges should not revisit the question absent changed circumstances—a possibility discussed more fully below.<sup>258</sup> Second, some states' charging-lien statutes contain peculiarities

<sup>254</sup> A constructive lien generally follows "the judgment into whatever form it may assume." *Froelich*, 80 S.W.3d at 363; see also *Trickett v. Laurita*, 674 S.E.2d 218, 229 (W. Va. 2009) (noting that a charging lien "follows the proceeds, wherever they may be found").

<sup>255</sup> See, e.g., *N. Pueblos Enters. v. Montgomery*, 644 P.2d 1036, 1038 (N.M. 1982) ("Because a court exercises its equitable powers in enforcing an attorney's charging lien, it may inquire into the reasonableness of the asserted fee for purposes of enforcing the lien."); *People v. Keefe*, 405 N.E.2d 1012, 1015 (N.Y. 1980) ("Generally, however, if an attorney is discharged without cause he will be allowed a charging lien upon the proceeds of the lawsuit, the amount to be determined on a *quantum meruit* basis at the conclusion of the case."); *infra* notes 274–79 and accompanying text.

<sup>256</sup> Some states attach charging liens only to the judgment. E.g., *Howell v. Howell*, 365 S.E.2d 181, 183 (N.C. Ct. App. 1988) ("A charging lien is not available until there is a final judgment or decree to which the lien can attach."). But even if the lien attaches to the cause of action, fees cannot be apportioned until the case concludes, which could happen in the transferor court.

<sup>257</sup> Transferee judges might also retain jurisdiction over fees if state substantive law permits the charging lien to attach to the cause of action. See *supra* notes 253–55 and accompanying text.

<sup>258</sup> *Infra* notes 289–93 and accompanying text; see also *In re Ford Motor Co.*, 591 F.3d 406, 411 (5th Cir. 2009) ("Under the law of the case doctrine and general principles of comity, a successor judge has the same discretion to reconsider an order as would the first judge, but should not overrule the earlier judge's order or judgment merely because the later judge might have decided matters differently." (quoting *United States v. O'Keefe*, 128 F.3d 885, 891 (5th Cir. 1982))); *In re Pharmacy Benefit Managers Antitrust Litig.*, 582 F.3d 432, 443 (3d Cir. 2009) (reversing the transferee judge's decision to vacate the transferor judge's decision to compel arbitration because it violated the law of the case); David F. Herr, *Multidistrict Litigation Manual* § 10.17 (2015); *Manual for Complex Litigation*, *supra* note 175,

like notifying the claimant about the lien in advance<sup>259</sup> or requiring contracts between the attorneys and clients.<sup>260</sup> Including lien information in class notice might satisfy some states' notice statutes,<sup>261</sup> but requiring class attorneys to have a direct contractual relationship with class members could inhibit fee recovery from clients in a minority of states, such as California.<sup>262</sup> Even in California, however, class attorneys can recover contingent fees from a class member's individual attorney on a quantum-meruit basis if the matter concludes successfully.<sup>263</sup>

Liens are not the only possibility for recovering issue-class counsel's fees; the common-benefit doctrine complements the common-fund doctrine in cases where no common fund exists but plaintiffs' attorneys confer a substantial benefit on the class, such as indivisible remedies.<sup>264</sup> In these cases, the common-benefit doctrine permits attorneys' fees when the litigation confers "a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them."<sup>265</sup> Using this theory to compensate issue-class counsel raises three questions: (1) what constitutes a substantial benefit; (2) how should fees be apportioned between class counsel and individual counsel; and (3) to what extent can a transferee judge who certifies an issue class retain jurisdiction to award counsel's fees?

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§ 20.133 ("Although the transferor judge has the power to vacate or modify rulings made by the transferee judge, subject to comity and 'law of the case' considerations, doing so in the absence of a significant change of circumstances would frustrate the purposes of centralized pretrial proceedings."); Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 577 (1978) (same).

<sup>259</sup> E.g., *Thompson v. Montgomery & Andrews, P.A.*, 816 P.2d 532, 534–35 (N.M. Ct. App. 1991).

<sup>260</sup> California is one such example. *Carroll v. Interstate Brands Corp.*, 121 Cal. Rptr. 2d 532, 535 (Cal. Ct. App. 2002) ("Because an attorney's lien is not automatic and requires a contract for its creation, a direct contractual relationship between the attorney and the client is essential.").

<sup>261</sup> For notice to be timely, it generally must take place before the lawsuit ends in judgment or settlement. *Levine v. Gonzalez*, 901 So. 2d 969, 974 (Fla. Dist. Ct. App. 2005).

<sup>262</sup> *Carroll*, 121 Cal. Rptr. 2d at 534–35.

<sup>263</sup> *Id.*; *Trimble v. Steinfeldt*, 224 Cal. Rptr. 195, 197–98 (Cal. Ct. App. 1986).

<sup>264</sup> *Hirsch & Sheehey*, *supra* note 243, at 83–84; *Allen v. Lloyd's of London*, 975 F. Supp. 802, 806 (E.D. Va. 1997) ("[A]n award of attorney's fees and expenses under the common benefit doctrine does not depend on the specific nature of the relief granted the plaintiff. Indeed, a fee award may be predicated on the grant of either monetary or equitable relief.").

<sup>265</sup> *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 393–94 (1970); see also *Allen*, 975 F. Supp. at 806 (citing *Mills*). For a discussion as to the ascertainability of the class, see *supra* Subsection III.A.3.

First, courts have not reached a clear consensus as to what constitutes a “substantial benefit,”<sup>266</sup> but analogous situations suggest that an issue class’s preclusive effect would suffice. For example, when union members sue their union, courts have determined that plaintiffs benefit other union members by establishing free speech rights<sup>267</sup> and incentivizing unions to change their practices.<sup>268</sup> And, in *Sprague v. Ticonic National Bank*, when a beneficiary litigated her rights against the defendant bank’s trust, her success indirectly established the rights of fourteen other beneficiaries.<sup>269</sup> Although the other beneficiaries were not before the Court, the Court nevertheless had the power to award fees. As the Supreme Court explained:

[W]hen such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation.<sup>270</sup>

Comparatively, issue classes are less of a stretch. If plaintiffs’ attorneys establish conduct components through an issue class and materially advance the class members’ claims, counsel has conferred a substantial, issue-preclusive benefit.<sup>271</sup> Failing to compensate class attorneys when plaintiffs cash in on that preclusive effect through a successful settlement or verdict would unjustly enrich plaintiffs at counsel’s expense.

Yet, the problem with the *Sprague* holding is obvious: Without appropriate boundaries on *stare decisis* as a substantial benefit, the doctrine is limitless. How is a court to distinguish between compensable benefits and positive externalities? If, for instance, several lawyers won sizeable verdicts on their own in separate courts, the positive externalities from those trials could spill over to other cases and prompt an aggregate settlement. But the beneficiaries would not pay for that externality. As the restitutionary basis for class-action awards makes plain, “[C]lass counsel

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<sup>266</sup> The *Principles* do, however, reflect a consensus among American Law Institute members that issue-class lawyers “will have conferred a substantial benefit on claimants insofar as that preclusive effect, in a given instance, inures to [claimants’] advantage in other proceedings.” *Principles of the Law of Aggregate Litigation*, supra note 42, § 2.09 cmt. c.

<sup>267</sup> *Hall v. Cole*, 412 U.S. 1, 8 (1973).

<sup>268</sup> *Erkins v. Bryan*, 785 F.2d 1538, 1549 (11th Cir. 1986).

<sup>269</sup> 307 U.S. 161, 163 (1939).

<sup>270</sup> *Id.* at 167.

<sup>271</sup> *Romberg*, supra note 8, at 333.

may base a claim for fees only on the *enhanced* recovery obtained for a class: the difference, in other words, between what the class received in consequence of the lawyer's intervention and what the class would have received without it."<sup>272</sup> Thus, differentiating compensable benefits from noncompensable spillovers requires courts to distinguish class members from the public as a whole (the ascertainability question covered previously<sup>273</sup>), and fairly apportion fees between class counsel and individual counsel.

The common-benefit doctrine is grounded in quantum meruit, which should guide fee-apportionment decisions.<sup>274</sup> Quantum meruit, "how much is merited," compensates issue-class counsel for the benefit conferred on class members and, because not all class members (or their individual attorneys) may benefit equally, allows judges to tailor awards accordingly.<sup>275</sup> Customizing the fair value of fee awards depends on several factors: class counsel's billing practices, work, and time spent;<sup>276</sup> class counsel's opportunity costs and financial risk;<sup>277</sup> the value class counsel conferred versus the amount of work the individual plaintiff's attorney contributed to the outcome;<sup>278</sup> and the plaintiff's ultimate suc-

<sup>272</sup> Restatement (Third) of Restitution and Unjust Enrichment § 29 cmt. c (2011).

<sup>273</sup> See *supra* Subsection III.A.3.

<sup>274</sup> *Lindy Bros. Builders v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 165 (3d Cir. 1973) ("The award of fees under the equitable fund doctrine is analogous to an action in *quantum meruit* . . ."); 1 Alba Conte, *Attorney Fee Awards* § 2:1 (3d ed. 2014); Burch, *supra* note 1, at 128–34.

<sup>275</sup> Restatement (Third) of Restitution and Unjust Enrichment § 39 cmt. B(ii) (2011); see Black's Law Dictionary 1361–62 (9th ed. 2009); Lauren Krohn, *Cause of Action by Attorney to Recover Fees on Quantum Meruit Basis*, 16 *Causes of Action* 85, § 3 (1988). Because quantum meruit provides recovery only for the enhanced value to the class, if class counsel represents some class members individually, then she can recover only for "time spent on matters common to all claimants," not for "*time spent on developing or processing individual issues in any case for an individual client.*" In re *Guidant Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 DWFAJB, 2006 WL 409229, at \*5 (D. Minn. Feb. 15, 2006).

<sup>276</sup> See *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974) (assessing time spent on a case); *Ackermann v. Levine*, 610 F. Supp. 633 (S.D.N.Y. 1985), *aff'd in part, rev'd in part*, 788 F.2d 830, 843–45 (2d Cir. 1986) (examining specific services rendered); *Hiscott & Robinson v. King*, 626 A.2d 1235, 1238 (Pa. Super. Ct. 1993) (considering an attorney's hourly billing rate); Restatement (Third) of the Law Governing Lawyers § 39 cmt. c (2000).

<sup>277</sup> E.g., *Richardson v. Parish of Jefferson*, 727 So. 2d 705, 708 (La. Ct. App. 1999); Restatement (Third) of the Law Governing Lawyers § 39 cmt. c (2000).

<sup>278</sup> *Anderson v. Anchor Org. for Health Maint.*, 654 N.E.2d 675, 681–82 (Ill. App. Ct. 1995); Krohn, *supra* note 275, § 4. See generally Restatement (Third) of the Law Governing Lawyers § 39 cmt. c (2000) ("The standard rate or hourly fee might be modified by other

cess. In fashioning these awards, judges should use the percentage method and adjust the percentage upward or downward depending on whether a case is remanded, if it subsequently goes to trial, if and when it settles, the role various attorneys played in achieving that settlement, and the overall cost-savings achieved through economies of scale.<sup>279</sup> Of course, the judge must also ensure that the total contingent fee stays within the limits of the applicable state's law.

Tailoring issue-class counsel's fee award raises the third issue: Can transferee judges retain jurisdiction over counsel's fee once the Judicial Panel on Multidistrict Litigation ("Panel") remands cases to transferor courts?<sup>280</sup> This is by far the most difficult hurdle. While precedent on this point is limited, under the plain language of Title 28 of the United State Code, Section 1407, transferee judges can suggest that the Panel separate fees before remanding the rest of the case, which would allow transferee judges to retain jurisdiction over the fee issue.<sup>281</sup> In practice, the Panel has allowed transferee judges to continue to preside over claims that benefit from uniform and consistent rulings, such as punitive damages.<sup>282</sup> Although attorneys' fees, like punitive damages, are not stand-alone claims, courts have recognized that "the meaning of 'claim' is not so circumscribed" as to include only a cause of action,<sup>283</sup> which suggests that transferee judges might retain jurisdiction over fee awards.

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factors bearing on fairness, including success in the representation and whether the lawyer assumed part of the risk of the client's loss, as in a contingent-fee contract.").

<sup>279</sup> Burch, *supra* note 1, at 133.

<sup>280</sup> Even if transferee judges cannot retain jurisdiction over fees, they can still issue a court order that binds transferor judges through the law-of-the-case doctrine, and class counsel can still assert a charging lien. See *supra* notes 253–63 and accompanying text.

<sup>281</sup> 28 U.S.C. § 1407(a) (2012) (allowing the Panel to "separate any claim" and "remand any of such claims before the remainder of the action is remanded").

<sup>282</sup> E.g., *In re Wilson*, 451 F.3d 161, 167 (3d Cir. 2006) (noting that the transferee judge refused to remand to ensure "uniform and consistent application of detailed medical criteria" to opt outs); *In re Collins*, 233 F.3d 809, 810 (3d Cir. 2000) (severing punitive damages); *In re Roberts*, 178 F.3d 181, 183 (3d Cir. 1999) (severing punitive damages); *In re Asbestos Prods. Liab. Litig. (No. VI)*, MDL No. 875, 2014 WL 3353044, at \*1 n.1 (E.D. Pa. July 9, 2014) ("When a case is remanded, it is the Court's regular practice to sever any claims for punitive or exemplary damages and retain jurisdiction over these claims in the Eastern District of Pennsylvania.").

<sup>283</sup> *Collins*, 233 F.3d at 811 (permitting transferee judge to retain jurisdiction over punitive damages and noting "a cause of action based upon negligence frequently is described as including 'claims' for property damage, lost wages, medical bills, and pain and suffering. Neither the statute's language nor the snippets of legislative history cited to us provides a basis for adopting the petitioners' crabbed reading of the word"). If class attorneys are not com-

On the other hand, allowing the transferee court to preside over fee issues after remand (and presumably post-trial) may run afoul of Section 1407 and the Supreme Court's opinion in *Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach*.<sup>284</sup> As *Lexecon* explains, a transferee court's authority is limited to "pretrial" proceedings and Section 1407 "obligates the Panel to remand any pending case to its originating court when, at the latest, those pretrial proceedings have run their course."<sup>285</sup> Attorneys' fees are post-resolution issues. Rule 23(h), which governs class counsel's fee, requires that counsel move for fees "no later than 14 days after the entry of judgment," and that judges state their factual findings and legal conclusions in accordance with Rule 52(a).<sup>286</sup> While transferee judges would be intimately familiar with class counsel's effort, without a settlement before remand, they could not make precise factual findings as to individual counsel's subsequent post-remand efforts.<sup>287</sup> And while efficiency and public policy may counsel in favor of allowing transferee judges to retain jurisdiction over fees, neither reason proved persuasive in *Lexecon*.<sup>288</sup>

Given these conflicting views, charting an appropriate course for awarding issue-class counsel's attorneys' fees that incentivizes representation but likewise hews to important doctrinal considerations is no easy feat. One compromise is to encourage transferee judges to issue interlocutory orders governing presumptive fee categories before remand.<sup>289</sup> As outlined above, judges could use quantum meruit principles to tailor these categories to the circumstances and list factors for transferor judges to consider within each group.<sup>290</sup> Although transferee judges would

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pensated for the benefit they conferred, they become the real parties in interest and own the fee cause of action. Conte, *supra* note 274, § 3:8.

<sup>284</sup> 523 U.S. 26 (1998).

<sup>285</sup> *Id.* at 34.

<sup>286</sup> Fed. R. Civ. P. 23(h); *id.* 54(d)(2).

<sup>287</sup> *Id.* 52(a).

<sup>288</sup> *Lexecon*, 523 U.S. at 32.

<sup>289</sup> Certifying courts have general authority to award fees under Rule 23(h). The Eighth Circuit has also ruled that "[i]t is well established that courts can impose liability for court-appointed counsel's fees on all plaintiffs benefitting from their services." *Walitalo v. Iacocca*, 968 F.2d 741, 747 (8th Cir. 1992).

<sup>290</sup> *Supra* notes 274–79 and accompanying text. Judges might consider the incentives fees create as illustrated by the Eighth Circuit in *Walitalo*, 968 F.2d at 748–49; see also Manual for Complex Litigation, *supra* note 175, § 21.71 ("Compensating counsel for the actual benefits conferred on the class members is the basis for awarding attorney fees."); Principles of the Law of Aggregate Litigation, *supra* note 42, § 3.13 cmt. b ("[T]he percentage method

lack both full information and jurisdiction to decide final fee awards, there are strong rationales for embedding likely fee-splitting scenarios in an interlocutory order. First, it lends some uniformity and predictability to fees subsequently awarded in dispersed transferor courts. Second, it provides some security for issue-class counsel who might be hesitant to undertake the endeavor for fear their payday may never come. Encompassing expected fees in an interlocutory order triggers at least some deference by transferor courts under the law-of-the-case doctrine,<sup>291</sup> clear error standards,<sup>292</sup> or comity.<sup>293</sup> These doctrines each suggest that transferor judges should not revisit the fee question absent changed circumstances.<sup>294</sup> Finally, because issue-class counsel cannot control how others handle the case on remand, this approach incentivizes class attorneys to inform and represent as many individual clients as possible. This may make smaller claims more economical to litigate on remand, prompt careful notice to class members, and ensure faithful counsel so long as no structural conflicts exist among clients.

To be sure, permitting the transferee court to give interlocutory orders pertaining to issue-class counsel's fee does nothing to inhibit those outside the federal court's jurisdiction (such as attorneys general litigating in state courts) from invoking issue preclusion and thereby free riding on class counsel's efforts without cost. Accordingly, some have argued that the transferee court's jurisdiction over the mutual defendant—and hence

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may not be feasible when the value of the common fund is difficult to assess. . . . In those circumstances, the court should use the lodestar method.”)

<sup>291</sup> E.g., *In re Ford Motor Co.*, 591 F.3d 406, 411 (5th Cir. 2009) (using law of the case to determine transferor court's deference to transferee court's orders); *In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 274–75 (E.D.N.Y. 2006); see also *Manual for Complex Litigation*, *supra* note 175, § 20.133 (suggesting that the transferor judge can vacate or modify rulings by the transferee judge subject to “law of the case” considerations, but that transferor courts should not do so absent a significant change in the circumstances because it would frustrate the purpose of centralization).

<sup>292</sup> E.g., *Motorola Mobilty v. AU Optronics Corp.*, No. 09-C-6610, 2014 WL 258154, at \*5 (N.D. Ill. Jan. 23, 2014); *Hill v. Ford Motor Co.*, 975 F. Supp. 2d 1351, 1359 (N.D. Ga. 2013).

<sup>293</sup> E.g., *Guddeck ex rel. Guddeck v. SmithKline Beecham Corp.*, 34 F. Supp. 3d 990, 997 (D. Minn. 2014) (suggesting that the law-of-the-case doctrine is inapplicable to interlocutory orders but nonetheless noting that “considerations of comity and judicial economy weigh against disturbing [a transferor] court's rulings” and applying a similar standard as *In re Ford Motor Corp.*, 591 F.3d at 410–11 (alteration in original) (quoting *Fenner v. Wyeth*, 912 F. Supp. 2d 795, 800 (E.D. Mo. 2012))); *Fenner*, 912 F. Supp. 2d at 799–800 (internal quotation marks omitted) (refusing to apply the law-of-the-case doctrine but recognizing considerations of comity and judicial economy).

<sup>294</sup> *In re Ford Motor Co.*, 591 F.3d at 411; Weigel, *supra* note 258, at 577.

the defendant's assets—should act as a conduit to tax free riders.<sup>295</sup> But this blurs the line between compensable benefits and noncompensable spillover effects and raises federalism concerns by asserting jurisdiction over plaintiffs and cases not properly before the court. As the Eighth Circuit has recognized, transferee courts cannot levy fee assessments on state-court plaintiffs via the defendant, for “[e]ven if the state plaintiffs’ attorneys participated in the MDL, the district court overseeing the MDL does not have authority over separate disputes between state-court plaintiffs and [the defendant].”<sup>296</sup> In short, thwarting some free riding is not worth the cost to predictability or federalism.

## 2. Resource Parity, Outcome Equality, and Appellate Brakes

Ensuring mechanisms to award issue-class counsel’s fees incentivizes issue classes and evens out the typical resource imbalance between a single plaintiff and a corporate defendant. Because preclusion can attach to issues adjudicated in nonclass litigation, defendants have every reason to heavily invest in a single case. And unless the plaintiff’s attorney represents many similarly situated clients, a defendant’s investment incentives may prove overpowering. Aggregate litigation is not cheap: Plaintiffs’ lawyers spend significant resources cultivating both generic and plaintiff-specific assets.<sup>297</sup> Yet, issue classes that target the defendant’s conduct can defray generic costs like discovery expenses and encourage attorneys to invest in small-claims cases.<sup>298</sup>

As parties’ investment incentives reach equilibrium, defendants raise concerns about undue settlement pressure.<sup>299</sup> As a descriptive matter,

<sup>295</sup> Conte, *supra* note 274, § 2:1 (citing jurisdiction over a corporation as a means for cost-spreading among shareholders in derivative suits as an example).

<sup>296</sup> *In re Genetically Modified Rice Litig.*, 764 F.3d 864, 874 (8th Cir. 2014).

<sup>297</sup> Richard A. Nagareda, *Mass Torts in a World of Settlement* 13–14 (2007); Joe Nocera, *Forget Fair; It’s Litigation as Usual*, N.Y. Times, Nov. 17, 2007, at C1, available at [http://www.nytimes.com/2007/11/17/business/17nocera.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2007/11/17/business/17nocera.html?pagewanted=all&_r=0) (estimating that a single Vioxx case initially costs between \$1 million and \$1.5 million to develop, but afterwards, others could litigate similar cases for around \$200,000).

<sup>298</sup> *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013) (“The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.” (quoting *Carnegie v. Household Int’l*, 376 F.3d 656, 661 (7th Cir. 2004)) (internal quotation marks omitted)).

<sup>299</sup> These so-called “blackmail” claims vary substantially in substance, claiming at times that blackmail occurs because class actions are not triable, are triable, that claims are too small, that claims are too large, and that size does not matter. Charles Silver, “We’re Scared to Death”: Class Certification and Blackmail, 78 N.Y.U. L. Rev. 1357, 1360–61 (2003); see

certifying a class increases the likelihood of settlement by bringing claims into the system that individuals have not initiated on their own and by decreasing the variability in outcomes. Put simply, without a class, some people would never sue and those who did would reach various conclusions. Nevertheless, empirical researchers at the Federal Judicial Center have disputed whether this pressure is “undue” and found that “[j]udges spent about eleven times more time on class actions than on the average civil case.”<sup>300</sup> So, it is unlikely that “the certification decision itself, as opposed to the merits of the underlying claims, coerced settlements with any frequency.”<sup>301</sup>

Issue classes not only bring claims into the system, they terminate the averaging effect of the “win-some, lose-some” mentality that allows a consensus about a defendant’s liability to emerge over time. Altering this laissez-faire paradigm has generated concerns about distributive justice and accuracy.<sup>302</sup> Some have suggested that a single trial is just one point on a frequency distribution.<sup>303</sup> Trying the same case 100 different times could yield varied results, thus a claim’s “true” value emerges only by averaging all the awards.<sup>304</sup> From a distributive-justice perspective, plaintiffs may be over- or under-compensated by a single class-wide trial. But that is true only if the class-wide trial adjudicates individuated eligibility components. Issue classes that target a defendant’s conduct would still permit a consensus to emerge as to pecuniary relief.

From an accuracy perspective, a single trial on a defendant’s conduct might reach the wrong result, which could pressure defendants to settle prematurely. Perhaps. But consider a few counter-concerns. First, with-

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also David Rosenberg, Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit, 2003 U. Chi. Legal F. 19, 40 (discussing risk aversion to trial and suggesting that “many erroneously claim that defendants are the exclusive or even the systematical-ly likely ‘victims’ of such excessive bargaining leverage”).

<sup>300</sup> Thomas E. Willging et al., Fed. Judicial Ctr., Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 61 (1996).

<sup>301</sup> Id.; see also Rosenberg, *supra* note 88, at 429–31 (providing a number of reasons to doubt that class actions actually exert blackmail pressure).

<sup>302</sup> See *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002) (“One suit is an all-or-none affair, with high risk even if the parties supply all the information at their disposal.”); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995) (raising accuracy concerns about issue classes); Glen O. Robinson & Kenneth S. Abraham, Collective Justice in Tort Law, 78 Va. L. Rev. 1481, 1516 (1992) (decrying the all-or-nothing nature of a single trial); Stier, *supra* note 238, at 1018–28.

<sup>303</sup> Michael J. Saks & Peter David Blanck, Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts, 44 Stan. L. Rev. 815, 834 (1992).

<sup>304</sup> Id.

out issue classes, resource and information asymmetries persist between the parties.<sup>305</sup> The settlement-pressure pendulum thus swings toward the plaintiff,<sup>306</sup> who may be forced to settle on the cheap or forgo her claim entirely. This begs the question of which pressure point is less normatively desirable in light of systemic compensation, deterrence, and procedural legitimacy goals.

Second, issue classes decrease the possibility of inconsistent outcomes and can thereby advance fundamental principles of fairness and outcome equality. Put plainly, like cases should be treated alike and cases with similar facts should reach similar outcomes.<sup>307</sup> Outcome disparity is no more apparent than when multiple cases reach inconsistent decisions on a defendant's uniform conduct.<sup>308</sup> Of course, outcome inequality is expected if the inconsistencies reflect differences in states' substantive laws.<sup>309</sup> But states differ most over eligibility components.<sup>310</sup> So, certifying conduct components can strike a delicate balance between achieving uniform outcomes as to a defendant's actions and allowing inconsistencies based on states' eligibility components to play out in subsequent cases.

Third, issue classes can enhance accuracy by alleviating undue settlement pressure from frivolous claims. When class actions introduce meritorious claims into the system, they enhance compensation and deterrence and exert no "undue" pressure. But that changes if weak claims lurk within the masses. Some generic mechanisms already exist to weed out frivolous class allegations, such as motions to dismiss for failing to state a claim, Rule 11 sanctions, summary judgment, and Rule 23(f)

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<sup>305</sup> See William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 *Cardozo L. Rev.* 1865, 1867 (2002) ("Our adversary system is premised upon the idea that the most accurate and acceptable outcomes are produced by a real battle between equally-armed contestants . . .").

<sup>306</sup> See Owen M. Fiss, *Against Settlement*, 93 *Yale L.J.* 1073, 1076–78 (1984) (describing the effects of resource imbalances on plaintiffs' settlement incentives).

<sup>307</sup> See Alexandra D. Lahav, *The Case for "Trial by Formula,"* 90 *Tex. L. Rev.* 571, 593–94 (2012) (discussing the importance of outcome equality); Rubenstein, *supra* note 305, at 1893 ("A common shibboleth of procedural justice is that 'like cases should be treated alike.'").

<sup>308</sup> Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 *Sup. Ct. Rev.* 331, 357; Rubenstein, *supra* note 305, at 1893–94.

<sup>309</sup> Larry Kramer, *Choice of Law in Complex Litigation*, 71 *N.Y.U. L. Rev.* 547, 579 (1996) (noting that when states differ over parties' rights, "[s]uch differences are what a federal system is all about. They are not a 'cost' of the system").

<sup>310</sup> See *supra* Subsection III.A.2 (discussing choice-of-law concerns).

class certification appeals.<sup>311</sup> Nevertheless, an issue class on nonindividuated conduct components with separate proceedings on individuated eligibility components provides a more precise tool to discourage plaintiffs' attorneys from pursuing meritless individual claims.

Although issue classes offer substantial benefits by evening out resource and information disparities, increasing outcome equality, and alleviating undue settlement pressure, they do place considerable stock in one trial. Juries and judges can err. And the outcome of that trial is not final in the appellate sense; the trial court (or courts) must still adjudicate any remaining issues. Thus, lingering error can impose substantial cost on parties and judges. Accordingly, as the *Principles of the Law of Aggregate Litigation* suggest, issue classes "must be accompanied by the opportunity for interlocutory appeal as to any class-wide determination of the common issue on the merits."<sup>312</sup> This not only enhances procedural justice and corrects error,<sup>313</sup> but also prevents the added cost of unraveling subsequent verdicts that rely on the integrity of the issue class judgment.

### *C. Disaggregating*

By their nature, issue classes leave some questions unresolved. The economic viability and complexity of resolving those remaining questions hinges on three variables: (1) whether the follow-on proceedings take place in the same court that certified the issue class or in courts dispersed throughout the country; (2) whether the same lawyer (or group of lawyers) handles subsequent litigation; and (3) whether the remaining issues require some level of collectivization to maintain their economic worth.

Some subsequent proceedings will be straightforward. When federal courts litigate federal questions that would entitle class members to con-

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<sup>311</sup> Rule 23(f) allows parties to appeal the certification decision, which principally benefits defendants. Appellate courts have accepted sixty-nine percent of defendants' appeals (and only thirty-one percent of plaintiffs'). Robert H. Klonoff, *The Decline of Class Actions*, 90 *Wash. U. L. Rev.* 729, 741 (2013). Once accepted, defendants successfully reversed certification seventy percent of the time, but, when plaintiffs appealed, they prevailed only thirty percent of the time. *Id.*

<sup>312</sup> *Principles of the Law of Aggregate Litigation*, supra note 42, § 2.09 cmt. b. The Subcommittee on Rule 23 has indicated a move in this direction. Advisory Committee on Rules of Civil Procedure, supra note 7, at 39–41.

<sup>313</sup> Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 *Wake Forest L. Rev.* 1, 35–37 (2009).

siderable damages, plaintiffs' attorneys have every incentive to recruit and represent those claimants in additional proceedings. *McReynolds v. Merrill Lynch* is a prototypical illustration: Once the district court determined whether Merrill Lynch's teaming and account distribution policies violated Title VII, "[e]ach class member would have to prove that his compensation had been adversely affected by the corporate policies, and by how much," but because most brokers "earn at least \$100,000 a year," individual suits were possible.<sup>314</sup> Moreover, those claims would continue in the same court that certified the issue class, which promotes consistency and efficiency, and should inform the certifying court's initial superiority analysis.

Issue classes can also further accuracy, efficiency, and federalism principles when various lawyers take the helm and litigate subsequent proceedings in courts throughout the country. Dispersed proceedings are most likely when (1) a transferee judge certifies an issue in multidistrict litigation and must remand cases to their transferor courts when class-wide proceedings conclude, and (2) states' attorneys general rely on nonmutual offensive issue preclusion to litigate *parens patriae* cases in state courts. Litigating cases before separate juries—regardless of whether the case remains before the same judge—can raise Seventh Amendment Reexamination Clause concerns. Accordingly, this Section considers each issue in turn.

### 1. Remanding Multidistrict Litigation to Transferor Courts

Remanding multidistrict litigation after resolving common conduct issues on a class-wide basis could make it uneconomical for some plaintiffs to pursue individual claims. But a remand need not prompt a slew of individual suits. Transferor courts within the same state could coordinate and resolve remanded claims on an aggregated basis under Section 1404(a) and Rule 42.<sup>315</sup> Remand strips away most of the nagging choice-of-law concerns that arise on the national level, which allows transferor courts to consider state-specific class actions on eligibility components.<sup>316</sup> Moreover, follow-on proceedings could litigate the individuat-

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<sup>314</sup> 672 F.3d 482, 491–92 (7th Cir. 2012).

<sup>315</sup> Elizabeth Chamblee Burch, *Disaggregating*, 90 Wash. U. L. Rev. 667, 692 (2013).

<sup>316</sup> Even though transferee courts rarely remand cases, when they have done so, they have cited the need for transferor courts to consider state-specific classes as a reason to remand. See *In re Light Cigarettes Mktg. Sales Practices Litig.*, 832 F. Supp. 2d 74, 74–75 (D. Me. 2011); *In re Chrysler LLC 2.7 Liter V-6 Engine Oil Sludge Prods. Liab. Litig.*, 598

ed personal-injury claims that plaintiffs' attorneys often relinquish in hopes of garnering plenary class certification.<sup>317</sup>

Conducting subsequent litigation in the transferor courts can alleviate both procedural and substantive concerns with issue classes. When "local"<sup>318</sup> judges interpret state laws and conduct trials within the affected community, it satisfies democratic concerns about community involvement in fact finding and should produce greater accuracy, less error, and increased fidelity to those laws. For example, litigating eligibility components in dispersed courts can correct error by bypassing nonappealable aggregate settlements, building secondary judicial review into the process, and enabling judges most familiar with a state's law to interpret and apply that law.<sup>319</sup> As Judge Easterbrook explained in *In re Bridgestone/Firestone, Inc.*, "The central planning model—one case, one court, one set of rules, one settlement price for all involved—suppresses information that is vital to accurate resolution."<sup>320</sup> This is principally true with regard to eligibility components, where states' laws differ most. Plus, without the onslaught of nationwide claims, transferor courts can dismiss cases that fail under specific state provisions.

## 2. Coordinating the Public and Private Regulatory Response

Because issue classes preclude subsequent cases from relitigating the same issues, they have the potential to bridge jurisdictional bounda-

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F. Supp. 2d 1372, 1373–74 (J.P.M.L. 2009). But see *Balt. Cnty v. AT&T Corp.*, 735 F. Supp. 2d 1063, 1098–99 (S.D. Ind. 2010) ("In this multi-district litigation, No. 1313, the court has presided over more than 40 state-wide class actions settlements through final judgments and administration of the settlements.").

<sup>317</sup> E.g., *Colindres v. QuietFlex Mfg.*, 235 F.R.D. 347, 375–76 (S.D. Tex. 2006); *Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 243 (W.D. Tex. 1999).

<sup>318</sup> By "local," I mean federal transferor judges sitting within the state whose laws will control the dispute's outcome.

<sup>319</sup> E.g., *Light Cigarettes*, 832 F. Supp. 2d at 77. Remanding to transferor courts builds some judicial redundancy into adjudication, which can lead to better decisions and correct erroneous interpretations of state law. See, e.g., *Gottschall v. Crane Co.*, No. A136516, 2014 WL 5025725, at \*43–46 (Cal. Ct. App. Oct. 8, 2014) (holding that the transferee judge misapplied an eligibility element—the sophisticated user doctrine—and refused to bind the plaintiff to that erroneous opinion through preclusion). On the benefits of judicial redundancy, see Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 *Wm. & Mary L. Rev.* 639, 646–57 (1981); Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 *Tul. L. Rev.* 2369, 2373 (2008). For more information on these points, see Burch, *supra* note 18.

<sup>320</sup> 288 F.3d 1012, 1020 (7th Cir. 2002).

ries.<sup>321</sup> When state attorneys general initiate *parens patriae* actions, they can help overcome the prism effect that makes it difficult for the private sector to hold defendants accountable.<sup>322</sup> But the cacophony of public and private litigants pushing different agendas while targeting the same conduct can lead to discord, inconsistent opinions, wasted litigant and judicial resources, and unpredictable preclusion.

Take the General Motors ignition switch debacle, for example: Shortly after a massive recall, General Motors was subject to five different governmental probes and fifty-five class action lawsuits.<sup>323</sup> Two months later, the number of state investigations alone swelled from one to nine, all of which proceeded in tandem alongside the other suits.<sup>324</sup> Courts' ability to formally coordinate these actions is jurisdictionally limited since state attorneys general often craft their claims to defeat removal to federal court.<sup>325</sup>

<sup>321</sup> State and federal courts must afford sister courts full faith and credit. U.S. Const. art. IV, § 1; 28 U.S.C. § 1738 (2012).

<sup>322</sup> See generally Gilles & Friedman, *supra* note 2, at 668 (“So state AGs can use *parens patriae* to get at many or most of the cases that would otherwise be the subject of class actions, and they can do so unconstrained by class action waivers and, at least for now, the other, lesser challenges that afflict class actions.”).

<sup>323</sup> Sarah N. Lynch, GM Says Facing Multiple Probes into Recent Recalls, Reuters (Apr. 24, 2014, 6:42 PM), <http://www.reuters.com/article/2014/04/24/us-gm-recall-investigation-idUSBREA3N1YU20140424>.

<sup>324</sup> GM Ignition-Switch Defect Response Probed by 9 States, Automotive News (June 12, 2014), <http://europe.autonews.com/article/20140612/OEM11/140619951/gm-ignition-switch-defect-response-probed-by-9-states>.

<sup>325</sup> See, e.g., *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 739 (2014); *In re Vioxx Prods. Liab. Litig.*, 843 F. Supp. 2d 654, 668–69 (E.D. La. 2012) (concluding that the Kentucky attorney general’s action against Merck did not “fall within the ‘slim category’ defined by *Grable*” and that it merely required the court to interpret FDCA provisions). Some courts addressing pharmaceutical products liability cases have held that federal question jurisdiction exists under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 313–16 (2005), because they present a substantial and disputed federal issue and intricate federal regulatory scheme. See, e.g., *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596, 2008 WL 398378, at \*3–5 (E.D.N.Y. Feb. 12, 2008). But see *Kentucky ex rel. Conway v. Janssen Pharm., Inc.*, 978 F. Supp. 2d 788, 794 (W.D. Ky. 2013) (distinguishing *Zyprexa* and citing *Vioxx* as favorable authority because “Kentucky sought ‘civil penalties pursuant to the KCPA and not federally-funded Medicaid reimbursement payments’” (quoting *Vioxx*, 843 F. Supp. 2d at 669)); *Vermont v. McGrx, Inc.*, No. 5:10-cv-95, 2010 WL 3767794, at \*6 (D. Vt. Sept. 16, 2010) (distinguishing *Zyprexa* and concluding that “the State’s claims in the instant case do not involve a similar federal mandate, do not overlap with the responsibilities of a federal agency, and do not present questions of national uniformity”).

But private and public attorneys have historically benefitted from one another's efforts through issue preclusion. For instance, in *Parklane Hosiery, Inc. v. Shore*,<sup>326</sup> once the Securities and Exchange Commission successfully proved that Parklane Hosiery issued a materially false and misleading proxy statement, private litigants did not need to relitigate that issue.<sup>327</sup> Although the roles are often reversed today—*parens patriae* claims increasingly follow in the wake of private litigation and sometimes settle alongside private cases in a comprehensive agreement—preclusion's role stays consistent.<sup>328</sup>

The large number of states that do not require mutuality<sup>329</sup> to assert issue preclusion afford public regulators the luxury of free riding on private counsel's efforts, which can promote consistency as well as substantive goals. State attorneys general are uniquely positioned to litigate small claims that are not economically viable standing alone, and can thus avoid sticky problems with private cy pres awards.<sup>330</sup> While an issue class proves helpful only insofar as states do not require mutual parties,<sup>331</sup> it can reduce inconsistent results across multiple jurisdictions and remedy, in part, the prism effect described in Part I.

### *3. Ensuring Adequate Representation and Preclusion*

Achieving consistency and efficiency is possible only if issue classes actually preclude relitigation. While preclusion is relatively straightforward for class members, states' attorneys general typically are not class members. Nevertheless, when defendants settle—with state attorneys or in a class action—they tend to invoke claim preclusion to prevent the nonsettling parties from relitigating on the theory they were adequately

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<sup>326</sup> 439 U.S. 322 (1979).

<sup>327</sup> *Id.* at 332–33.

<sup>328</sup> See Jay L. Himes, *When Caught with Your Hand in the Cookie Jar . . . Argue Standing*, 41 Rutgers L.J. 187, 217 (2009) (“[I]n recent years, the states’ major pharmaceutical-drug antitrust cases have followed on-going private litigations and were generally settled along with the private actions.”); Jef Feeley & David Voreacos, *Merck to Plead Guilty, Pay \$950 Million in U.S. Vioxx Probe*, Bloomberg Bus. (Nov. 23, 2011, 9:44 AM), <http://www.bloomberg.com/news/articles/2011-11-22/merck-agrees-to-pay-950-million-to-settle-u-s-government-s-vioxx-probe> (noting that in addition to settling private claims, “[t]he company agreed in 2008 to pay \$58 million to settle claims by 29 states”).

<sup>329</sup> See *supra* note 211 (listing states that do not require mutuality).

<sup>330</sup> See *Principles of the Law of Aggregate Litigation*, *supra* note 42, § 3.07(b) (discussing when cy pres awards are appropriate).

<sup>331</sup> See *supra* note 211 (listing states that permit non-mutual offensive issue preclusion).

represented in the first suit.<sup>332</sup> Precluding private suits in the wake of a *parens patriae* action can be particularly problematic since those suits have not been subjected to Rule 23's adequacy requirement and attorneys general may prioritize political agendas and quick resolution over private claimants' interests.<sup>333</sup>

Deciphering adequate representation in subsequent suits is not an insurmountable hurdle. As I have described elsewhere,<sup>334</sup> these inquiries should turn on the nature of the rights initially at stake. If the right in the first suit arises from an aggregate harm—a harm that affects a group of people equally and collectively—and demands an indivisible remedy, then courts should tolerate greater conflicts and preclude subsequent individual claims.<sup>335</sup> When the harm and remedy are consistent for all class members or state citizens, if one group member is inadequately represented then they all are. Thus inadequate representation occurs only when lawyers or named representatives act contrary to the group's best interests or try to represent an over-inclusive group.<sup>336</sup>

For instance, when state actors litigate aggregate harms like water rights or subway fares, they typically demand indivisible remedies or statutory penalties that treat affected victims uniformly.<sup>337</sup> The same is true when a public or private actor litigates a defendant's conduct components: So long as a defendant's conduct was uniform, all regulators have shared incentives to "prosecute" that conduct. Thus, representation would be inadequate only if the lawyers or the named representatives acted contrary to the group's best interests or attempted to represent an over-inclusive, noncohesive group where a defendant's conduct toward the members varied.<sup>338</sup> Consequently, when issue classes or *parens patriae* suits litigate conduct components or aggregate rights, judges

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<sup>332</sup> E.g., *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 46 F. Supp. 3d 440, 443 (S.D.N.Y. 2014) (concluding that the water authority was precluded by previous state litigation). Compare *Brown & Williamson Tobacco Corp. v. Gault*, 627 S.E.2d 549, 551–52 (Ga. 2006) (precluding an individual tobacco plaintiff from recovering punitive damages), with *Bullock v. Phillip Morris USA, Inc.*, 131 Cal. Rptr. 3d 382, 392–93 (Cal. Ct. App. 2011) (permitting an individual tobacco plaintiff to recover punitive damages).

<sup>333</sup> Lemos, *supra* note 63, at 532–36; Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 Harv. L. Rev. 853, 858–62 (2014); Zimmerman, *supra* note 63, at 217.

<sup>334</sup> Burch, *supra* note 78, at 3070–77.

<sup>335</sup> *Id.* at 3057–61.

<sup>336</sup> *Id.* at 3051–57.

<sup>337</sup> See *supra* notes 64–68 and accompanying text (discussing public rights).

<sup>338</sup> Burch, *supra* note 78, at 3061, 3070–77.

should presume that the regulator adequately represents those collective rights and tolerate greater intra-group conflicts.<sup>339</sup>

Conversely, when state attorneys general pursue private, individual rights—as they might under their quasi-sovereign interests<sup>340</sup>—courts should not preclude affected individuals from pursuing their own claim if a structural conflict existed,<sup>341</sup> there was an inequitable allocation of divisible remedies, the attorney general lacked a sufficient motive to pursue the case, or the prosecution was completely inept.<sup>342</sup> This allows attorneys general the latitude to pursue a wide array of harms (including small claims that might otherwise be under-enforced), but preserves citizens' individual right to sue if the litigation forecloses their rights without adequate representation.

#### *4. Seventh Amendment Reexamination Clause Concerns*

For a handful of courts, the Seventh Amendment's Reexamination Clause can pose one final hurdle to the greater use of issue classes.<sup>343</sup> Closely tied to the right to a jury trial and designed to prevent juries' decisions from being eviscerated through subsequent legislative or judicial abuse,<sup>344</sup> the Reexamination Clause states, "[N]o fact tried by a jury,

<sup>339</sup> See *id.* at 3077. This would, of course, cover instances in which the public actor traded the public interest for timely campaign contributions.

<sup>340</sup> See *supra* note 64 and accompanying text.

<sup>341</sup> See Principles of the Law of Aggregate Litigation, *supra* note 42, § 2.07(a). That is, a conflict of interest either between the "claimants and the lawyers who would represent claimants on an aggregate basis" or "among the claimants themselves that would present a significant risk that the lawyers for claimants might skew systematically the conduct of the litigation so as to favor some claimants over others on grounds aside from reasoned evaluation of their respective claims or to disfavor claimants generally vis-à-vis the lawyers themselves." *Id.*

<sup>342</sup> See *id.* § 1.02 cmt. b(1)(B).

<sup>343</sup> See, e.g., *Olden v. LaFarge Corp.*, 383 F.3d 495, 509 n.6 (6th Cir. 2004) (citing *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303–04 (7th Cir. 1995)) (positing that the bifurcation plan might violate the Seventh Amendment); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996) (agreeing with the analysis in *Rhone-Poulenc*); *Rhone-Poulenc*, 51 F.3d at 1303–04 (arguing that judges cannot "divide issues between separate trials in such a way that the same issue is reexamined by different juries"). But see *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1232 (9th Cir. 1996) (observing that the decision and concerns in *Rhone-Poulenc* "may not be fully in line with the law of this circuit").

<sup>344</sup> See Wilfred J. Ritz, *Rewriting the History of the Judiciary Act of 1789*, at 42 (1990) ("In three of the New England states—Massachusetts, New Hampshire, and Rhode Island—there was an opportunity for multiple trials. The decision, either real or sham, resulting from a trial in an inferior tribunal could be appealed to a superior tribunal, where a second and entirely new trial could be had.").

shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.”<sup>345</sup>

In *In re Rhone-Poulenc Rorer, Inc.*, the Seventh Circuit reversed issue-class certification based, in part, on the fear that subsequent juries would violate the Reexamination Clause by reconsidering facts relating to a defendant’s conduct when hearing evidence on the plaintiffs’ eligibility for relief.<sup>346</sup> Breaching a duty, Judge Posner thought, was conceptually intertwined with proximate cause and negligence.<sup>347</sup> Pragmatically, the issue class made little sense: The follow-on cases would have to rehash much of the same evidence, which meant the class did not materially advance the claims’ resolution. But that pragmatic concern should not rise to the level of a constitutional one.<sup>348</sup>

Shedding light on the distinction between pragmatic and constitutional concerns requires properly construing the word “fact” in the Reexamination Clause itself. Jurors are the fact finders: they sift through the facts of the case, apply them to a claim’s legal elements, and determine whether those elements have been satisfied.<sup>349</sup> Reexamining much of the same *evidence* in subsequent proceedings bears on whether an issue class materially advances the litigation, but it does not mean that a second jury will decide the same legal *element*.<sup>350</sup> Reexamination Clause violations should occur only if subsequent juries reexamine a legal element determined by the issue class.<sup>351</sup> That might happen, for example,

<sup>345</sup> U.S. Const. amend. VII.

<sup>346</sup> *Rhone-Poulenc*, 51 F.3d at 1302–04.

<sup>347</sup> *Id.* at 1303. But see Campos, *supra* note 88, at 1073.

<sup>348</sup> The Seventh Circuit’s more recent cases have implicitly abandoned the Seventh Amendment Reexamination Clause concerns as the circuit has embraced the greater use of issue classes. E.g., *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 798 (7th Cir. 2013) (“A determination of liability could be followed by individual hearings to determine the damages sustained by each class member.”); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 492 (7th Cir. 2012) (certifying an issue class and noting “the next stage of the litigation, should the class-wide issue be resolved in favor of the plaintiffs, will be hundreds of separate suits for backpay”); *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 911 (7th Cir. 2003) (“If there are genuinely common issues . . . then it makes good sense, especially when the class is large, to resolve those issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings.”).

<sup>349</sup> Woolley, *supra* note 237, at 520–22.

<sup>350</sup> *Robinson v. Metro-N. Commuter R.R. Co.*, 267 F.3d 147, 169 n.13 (2d Cir. 2001) (“Trying a bifurcated claim before separate juries does not run afoul of the Seventh Amendment, but a ‘given [factual] issue may not be tried by different, successive juries.’” (alteration in original) (quoting *Blyden v. Mancusi*, 186 F.3d 252, 268 (2d Cir. 1999))).

<sup>351</sup> *Houseman v. U.S. Aviation Underwriters*, 171 F.3d 1117, 1128 (7th Cir. 1999) (“The prohibition is not against having two juries review the same evidence, but rather against hav-

if the issue class verdict form is imprecise and muddies which elements were actually decided so that subsequent juries might be tasked with re-determining the same elements.<sup>352</sup> But that risk can be avoided by using special verdict forms and instructing subsequent juries as to the first jury's findings.<sup>353</sup>

#### CONCLUSION

Federalism concerns and jurisdictional restrictions make it challenging for most private and state regulators to capture the full scope of any national corporate misconduct. This leads to dueling concerns: too few successful actions in areas typically left to private enforcement like products liability, consumer protection, and employment discrimination; and too many competing lawsuits in cases of blatant, high-profile wrongdoing. Simultaneous concerns about both over- and under-enforcement proliferate alongside anxieties about inconsistent judgments, inefficient resource use, and inadequate representation.

Yet, issue classes are well positioned to enhance the enforcement landscape in two ways. First, they can short-circuit the prism effect that has hobbled private class actions in recent years. Rethinking class cohesion and certifying core conduct elements when a defendant's actions are uniform not only revives class actions by divorcing common components from individuated eligibility components, but also equips both plaintiffs and defendants with a powerful procedural weapon: two-way preclusion. It is this two-way preclusion that promises the second benefit. So long as appellate review on the merits exists to correct error and courts take appropriate steps to ensure adequate representation, litigating uniform conduct in a single class-wide trial can mute the discord of

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ing two juries decide the same essential issues." (quoting *Paine, Webber, Jackson & Curtis, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 587 F. Supp. 1112, 1117 (D. Del. 1984)) (internal quotation marks omitted)).

<sup>352</sup> See, e.g., *Blyden*, 186 F.3d at 257, 268–69 (noting that both the liability jury and the damages juries were tasked with deciding which acts constituted "reprisals" after the 1971 riot in Attica prison and that there was a "real possibility" that what constituted a reprisal would be relitigated by subsequent juries); *Simon v. Philip Morris Inc.*, 200 F.R.D. 21, 36 (E.D.N.Y. 2001) (observing that "different issues can be submitted to different juries as long as they are not presented in a way that causes juror confusion or uncertainty"); Steven S. Gensler, *Bifurcation Unbound*, 75 Wash. L. Rev. 705, 736–37 (2000) (noting the need to "carefully define the roles of the two juries" and "carefully craft the verdict form for the first jury so that the second jury knows what has been decided already").

<sup>353</sup> Woolley, *supra* note 237, at 542.

overlapping regulators through preclusion. While subsequent suits may persist, in the majority of states that have abandoned the mutuality requirement, courts need not relitigate the same conduct-related questions. Efficient resource use and consistent judgments follow accordingly.