MDL DRANO: RULE 23-BASED SOLUTIONS TO MASS TORT BUILDUP

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I
INTRODUCTION

It has been taken as gospel, over the past quarter century, that class action procedures are unavailable in mass tort cases. This Article examines two distinct challenges to that assumption—one resting on Rule 23(c)(4)'s issue class procedure and the other on an innovation advanced by Francis McGovern, in whose honor this Article and symposium are dedicated.

First, Rule 23(c)(4) issue-classing provides multidistrict litigation (MDL) courts with a uniquely potent tool for streamlining mass tort litigation while respecting the autonomy of individual claimants.[1] The object of the (c)(4) trial is a judicial declaration that resolves disputed issues regarding the defendant's conduct that are common across claimants. In the typical mass tort case, where liability turns on hotly disputed factual issues and the parties' bargaining positions are polarized accordingly, it stands to reason that a unitary and binding determination of the defendant's wrongdoing will help drive resolution. The issue judgment likewise enables the individual tort victim to press her damages case in a subsequent independent proceeding. Whether in state court, arbitration, or wherever venue may lie, the individual plaintiff will have the option of trying her damages case without an extensive team of lawyers, investigators and experts. The issue class judgment thus creates access to a manageable individual trial, where a single victim may be well represented by a single generalist injury lawyer working on a contingent fee basis.

And yet, since the mid-1990s, the issue class tool has been regarded as largely unavailable in the mass tort context. Two circuit court cases in particular—*In re Rhone-Poulenc Rorer Inc.*[2] and *Castano v. American Tobacco Co.*[3]—rejected mass tort issue-classing in sweeping terms, casting a shadow that extends to the

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1. Fed. R. Civ. P. 23(c)(4) ("When appropriate, an action may be brought or maintained as a class action with respect to particular issues.").

2. 51 F.3d 1293 (7th Cir. 1995).

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

present day. But the durability of this shadow is puzzling. As we have shown elsewhere, the doctrinal underpinnings of *Rhone-Poulenc* and *Castano* have long since unraveled.[4] Most significantly, courts have now retired the canard that the Seventh Amendment poses a serious bar to mass-tort issue-classing, and all circuits now reject the requirement—which started with *Castano*—that common issues must predominate with respect to the case as a whole before a class may be certified to try a specific issue under Rule 23(c)(4).[5]

So, why have we not seen more issue-classing in mass torts? Part of the answer may be that a generation of lawyers has registered the oversimplified message that class action procedures are non-viable in mass tort cases. But there are other reasons as well. For one, issue-classing is a form of bifurcation—and it is a credo of the plaintiffs' bar that bifurcating liability and damages depresses recovery values.[6] Other reasons include a belief that the current bellwether trial regime increases settlement values by producing the occasional blockbuster verdict, and a potential concern by plaintiff steering committees (PSCs) that an issue class judgment will impede aggregate settlement by making it too easy for individually-retained lawyers to decline offers to settle their case portfolios and choose instead to proceed to trial with an issue judgment in hand.

Whatever the reason, it is probably unrealistic in the short term to expect plaintiffs' steering committees to advocate for issue class treatment. And defendants, for their part, invariably want to avoid a binding up-or-down verdict on key liability issues. As a consequence, the issue class device lacks a natural champion in the adversary system. But these observations tell us little about whether issue classes are desirable from the perspective of the MDL judge. And indeed, the specific concerns that the parties are likely to have with issue-classing are strikingly unpersuasive when viewed from the court's perspective. As we argue below, from the Olympian vantage point of the judiciary, the issue class tool is well designed to unclog crowded MDL dockets.

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4. *See* Myriam Gilles & Gary Friedman, *Rediscovering Issue Classes in Mass Tort MDLs*, 53 GA. L. REV. 1305, 1322–31 (2019) (observing that, in recent years, courts have largely repudiated the "objections to mass tort issues classes that emanate from *Rhone-Poulenc* and *Castano*").

5. *See, e.g.*, Simon v. Philip Morris, Inc., 200 F.R.D. 21, 33 (E.D.N.Y. 2001) (observing that "[t]he historical record demonstrates that the Framers' main objective in drafting the Seventh Amendment was to limit the ability of an appellate court, specifically the Supreme Court, to review de novo and overturn a civil jury's findings of fact," but that the use by trial courts of tools "such as new trials, remittitur, JNOV, directed verdicts, and special verdicts" is unproblematic under the Seventh Amendment "even though all of these invite federal trial judges to take even issues of historical fact out of juries' hands"). Indeed, only four years after *Rhone-Poulenc*, the Seventh Circuit recognized that courts may bifurcate injury and liability issues consistent with the Seventh Amendment. Houseman v. U.S. Aviation Underwriters, 171 F.3d 1117, 1126–28 (7th Cir. 1999) (distinguishing *Rhone-Poulenc* to find that bifurcation did not violate the Seventh Amendment); *see also* Martin v. Behr Dayton Thermal Prods. LLC, 896 F.3d 405, 417 (6th Cir. 2018) ("[If] done properly, bifurcation will not raise any constitutional issues." (quoting Olden v. Lafarge Corp., 383 F.3d 495, 509 n.6 (6th Cir. 2004)).

6. *See, e.g.,* Brian H. Bornstein, *From Compassion to Compensation: The Effect of Injury Severity on Mock Jurors' Liability Judgments*, 28 J. APPLIED SOC. PSYCH. 1477, 1485 (1998) (demonstrating that severity of plaintiff's injuries significantly increased both sympathy jurors felt for plaintiff and plaintiff's likelihood of prevailing on liability).

Still, if the parties are not presently inclined to seek issue classes in mass tort cases even if they promote judicial efficiency and—we would argue—overall welfare, can we expect MDL courts to implement the practice on their own? Possibly. In the ongoing MDL concerning Fiat-Chrysler's "monostable gear shifters" in the Eastern District of Michigan (FCA MDL),[7] the idea to certify a Rule 23(c)(4) issue class to determine key liability facts emanated from the MDL judge himself, sua sponte.[8] That litigation, which we discuss below in Part II, provides something of a test-drive for the use of (c)(4) issue-classing in MDLs, raising important questions including the application of *Lexecon, Inc. v. Milberg Weiss*,[9] which generally prevents the MDL court from conducting trials of transferred cases without the consent of the parties.[10]

A second and very different application of Rule 23 in the MDL mass tort context was recently attempted by another district court in the Sixth Circuit, the National Prescription Opiate Litigation (Prescription Opiate MDL),[11] pending in the Northern District of Ohio. Adopting a novel theory developed by Professors Francis McGovern and William Rubenstein,[12] the district court in that case certified a "negotiation class" under Rule 23(b)(3).[13] The negotiation class, quite unlike the issue class, is not designed to influence the conduct of litigation. Instead, as we discuss below in Part III, its exclusive focus is on facilitating "global" resolution with various defendant groups.[14] And while the Sixth Circuit sitting en banc has recently rejected the district court's certification of the negotiation class[15]—affirming a split panel decision[16] just as this Article goes to print—the negotiation class concept may yet be attempted elsewhere, having attracted considerable academic attention and endorsement from major repeat-player plaintiffs' firms. In any event, the concept provides a unique vehicle for considering the application of class procedures in the mass tort MDL context.

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7. *In re* FCA US LLC Monostable Elec. Gearshift Litig., MDL No. 2744 (E.D. Mich.).

8. Opinion and Order Granting in Part and Denying in Part Plaintiffs' Motion to Certify Class Action and Certifying Issue Classes, FCA US LLC Monostable Elec. Gearshift Litig., MDL No. 2744 (E.D. Mich. Dec. 9, 2019), ECF No. 492 [hereinafter FCA MDL Order].

9. 523 U.S. 26 (1998).

10. *Id*. at 38.

11. *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio).

12. *See* Francis McGovern & William Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEX. L. REV. 73, 78–9 (2020) ("In this Article, we offer heterogenous class members a mechanism for cooperation, a new form of class certification that we call *negotiation class certification.*").

13. *In re* Nat'l Prescription Opiate Litig., 332 F.R.D. 532, 537 (N.D. Ohio 2019); *see also* Fed. R. Civ. P. 23(b)(3) ("A class action me be maintained if . . . questions of law or fact common to class members predominate over any questions affecting only individual members . . .").

14. McGovern & Rubenstein, *supra* note 12, at 73 (arguing that "if the class members could unite, they might increase their leverage and extract a premium from a defendant eager to settle the whole package of claims, with that global settlement simultaneously benefiting the defendant").

15. *In re* Nat'l Prescription Opiate Litig., MDL No. 2804, 2020 U.S. App. LEXIS 40688, at *5 (6th Cir. Dec. 29, 2020).

16. *In re* Nat'l Prescription Opiate Litig., 976 F.3d 664 (6th Cir. 2020).

In broad strokes, the procedure adopted in the Prescription Opiate MDL begins by certifying a class for the purpose of negotiating a global deal. A formula for the allocation of eventual proceeds is proposed by the PSC—now, class counsel—and, on that basis, class members make decisions whether to opt out.[17] Because the opt-out decision precedes negotiations, the defendants understand the scope of the class with whom they are negotiating. Their skepticism about the PSC's ability to deliver on a global deal is allayed. Defendants are under no obligation to negotiate with the class—no more than they were with an ordinary PSC—but if a deal is struck with the negotiation class, then the terms are put to the class members for a vote. If the measure passes by super-majority, then the class members are bound by the agreement and its release provisions.[18] Only those who opted out at the front end will retain their individual actions, free and clear of the release. And if a deal is not struck, then there is no class action for litigation purposes; the MDL proceeds as though the negotiation class never happened.

This Article begins with a close examination of these Rule 23-based models. As we show in Part II, the issue class model would unclog MDLs by quickly and efficiently litigating major merits issues—but carries with it a substantial risk that plaintiffs could lose on the merits. But, as we show, this is a risk inherent in the adversary system—and should not give us undue pause here. Part III then examines the negotiation class model, which aims to achieve settlement purely by addressing the collective action problems created when large stakeholders threaten exit.[19] Defendants are understandably loath to negotiate with a PSC who cannot speak for such large claimants, and may also worry that any deal they are able reach with the PSC will give these outlier plaintiffs tremendous hold-out leverage. The negotiation class solves for these twin dilemmas by settling on an allocation scheme at the front end and forcing stakeholders to exercise an early opt-out.

Part IV compares and contrasts these class action-based models, which ultimately have little in common beyond shared roots in Rule 23. In this Part, we observe that a preference for one approach over the other may turn, in part, on the nature and facts of the given litigation—but equally important is the judicial

17. *In re* Nat'l Prescription Opiate Litig., 332 F.R.D. at 537 ("Plaintiffs' attorneys have worked together to establish a public health-based settlement allocation plan, the details of which are all made available to the Class and public at a case website."); *id.* ("At the front end, before having to make the opt-out decision, the class members can calculate their share of any future settlement.").

18. *Id*. ("At the back end, each class member will be entitled to vote (yes or no) on whether a proposed settlement amount is sufficient, and no settlement will be deemed accepted unless it garners a supermajority (75%) of those voting; here, a proposal will need to secure approval from six separate supermajority vote counts, reflecting different slices of the class.").

19. McGovern & Rubenstein, *supra* note 12 at 74 ("By establishing the contours of the class prior to settlement discussions, negotiation class certification would provide the defendant with a precise sense of the scope of finality a settlement would produce, hence encouraging a fulsome offer."). *See also In re* Nat'l Prescription Opiate Litig., 332 F.R.D. at 537 ("Defendants in this MDL are concerned that many [city and county] Plaintiffs could opt out," so Defendants would have "paid a lot of money to settle non-litigating claims but would still have to litigate a host of potentially significant claims").

philosophy of the MDL judge. To wit: if the negotiation class model represents the apotheosis of managerial judging,[20] then the issue class takes a fundamentally adjudication-centric approach to alleviating docket congestion in mass-tort MDLs. Accordingly, we argue that the issue class approach is a more effective means of managing mass tort litigation, and one that enables the MDL court to perform the role for which it was intended.

II
THE ISSUE CLASS MODEL AND THE FCA MDL

A principal insight of the issue class model is that current MDL practice is marked by undue aversion to binding adjudication.[21] The standard bellwether trials are a singularly attenuated way of using the adjudicatory process to inform negotiated resolution.[22] To be sure, big bellwether verdicts can drive settlements, and defendants can be expected to take notice when they lose multiple bellwether trials.[23] But so too can the informational effects of bellwethers be murky, as when plaintiffs win some trials and defendants win some trials.[24] Absent broad

20. This phrase is often associated with Judith Resnik's influential scholarship chronicling the modern judge's embrace of settlement over adjudication, and the concomitant focus on "managing" cases rather than resolving them through the adversarial process. *See, e.g.* , Judith Resnik, *Managerial Judges,* 96 HARV. L. REV. 374, 376 (1982). The negotiation class offers a set of distinctly managerial tools—or one could even say political tools—to be wielded by the district judge in much the same way as a political leader might seek a legislative result.

21. Some MDL courts have tried to bring binding adjudication to bear outside the Rule 23 context through so-called "binding bellwethers." But these attempts have met with failure in the appellate courts. See, e.g., *In re Chevron*, 109 F.3d 1016 (5th Cir. 1997). The flaw in the binding bellwether model is that, without a Rule 23 analysis, the court lacks a basis to infer the homogeneity required to bind non-parties consistent with due process. *Id.* The binding bellwether, in effect, is an attempt to use the doctrine of offensive nonmutual issue preclusion to supplant the requirements of Rule 23. *See generally,* Linda S. Mullenix, *Problems in Complex Litigation*, 10 REV. LITIG. 213, 222 (1991) ("[T]he federal appellate courts have effectively eliminated issue preclusion as a means of preventing the re-litigation of duplicative claims, except in the narrowest of circumstances. These doctrines have frustrated the ability of federal courts to deal with mass tort cases in an aggregative fashion, thus requiring the repetitive adjudication of thousands of similar claims.").

22. Eldon Fallon, Jeremy Grabill & Robert Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2332 (2008) (observing that "[t]he ultimate purpose of holding bellwether trials [is] not to resolve the thousands of related cases pending in the MDL . . . but instead to provide meaningful information and experience to everyone involved").

23. *See* Mihir Zaveri, *Monsanto Weedkiller Was "Substantial Factor" in Causing Man's Cancer, Jury Says*, NEW YORK TIMES, (March 19, 2019), available at https://www.nytimes.com/2019/03/19/business/monsanto-roundup-cancer.html?searchResultPosition=1 [https://perma.cc/K8YN-HYGV] (reporting on an $80 million verdict in a bellwether trial involving a plaintiff who used Roundup and developed stage 3 non-Hodgkin's lymphoma); Patricia Cohen, *Roundup Maker to Pay $10 Billion to Settle Cancer Suits*, NEW YORK TIMES, (June 24, 2020) (reporting that, in the wake of the bellwether verdict and other jury verdicts, Bayer had agreed to "pay more than $10 billion to settle tens of thousands of claims while continuing to sell the product without adding warning labels about its safety").

24. *See* Fallon et al, *supra* note 22, at 2335 (reporting that, in addition to six bellwether trials held in the federal MDL court, "approximately 13 thirteen additional cases were tried before juries in state courts in New Jersey, California, Texas, Alabama, Illinois, and Florida" and that Merck won most of the bellwethers). Further, not all mass tort MDLs feature bellwether trials. ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION at 27-30 (2019) (reporting that bellwether trials take place in only 44% of mass tort MDLs).

preclusive effects, the bellwether trials themselves are merely exercises yielding data-points for negotiators to consider.[25] In the long slow dance of MDL tort litigation, the principals—the PSC and defense—circle round and round, sometimes modifying their bargaining positions in response to the occasional bellwether verdict, and sometimes not.

The issue class model replaces debatable data-points with binding judgments on key liability issues. Where core liability questions are hotly disputed, these binding judgments will presumably impel defendants to improve aggregate settlement offers and will enhance the ability of individual plaintiffs or firms to try damages cases to a jury. Whether these benefits outweigh the informational effects of bellwether trials in any given MDL is a separate question—and one that might well be answered differently by judges, defendants, PSCs and individually retained lawyers.

Where the benefits of issue classing are apparent, the transferee court may certify a standalone Rule 23(c)(4) class seeking a declaratory judgment with respect to certain delineated issues.[26] At one time, the prevailing view was that declaratory judgments, as mere precursors to suits for damages or injunctions, were "beyond the power conferred on the federal judiciary" in the Cases or Controversies Clause.[27] But the Supreme Court recognized in 1937 that "the judicial function may be appropriately exercised" in a declaratory case, "although the adjudication of the rights of the litigants may not require the award of process or the payment of damages."[28] And in modern times, as Judge Posner has observed, the principal utility of a declaratory judgment is to serve as "a prelude to a request for other relief, whether injunctive or monetary."[29]

Cases seeking a judicial declaration "with respect to particular issues" may be "brought or maintained as a class action" under Rule 23(c)(4).[30] What that means, in our view, is that the members of a successful issue class receive a judgment that operates as a sort of ticket, which the bearer may present in a court of competent jurisdiction and thereby establish, conclusively, the particular issue or element in her case for individual damages. The key to the successful operation of this model is crisp and clear framing of the issues presented for resolution in

25. *But see* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1842 (1995) (describing the "life cycle" of a mass tort and suggesting that plaintiffs may gain an advantage over time once "they have discovered sufficient information and expertise to present a credible case on liability, causation, and damages; have surmounted legal obstacles or made new, more favorable law; and have developed a second-generation offensive strategy to counter the previously successful approach of the defense").

26. Myriam Gilles & Gary Friedman, *The Issue Class Revolution*, 101 B.U. L. REV. 133, 151 (2021) (describing "the issue class action [as] a standalone vehicle for declaratory relief").

27. Willing v. Chicago Auditorium Association, 277 U.S. 274, 283–84 (1928); *see also* Andrew Brandt, *Much to Lose, Nothing to Gain,* 58 ARK. L. REV. 767, 829 (2006).

28. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 242 (1937).

29. Berger v. Xerox Retir. Income Guar. Plan, 338 F.3d 755, at 763 (7th Cir. 2003); *see also id.* at 764 ("[a]s long as the concrete follow-on relief. . .will if ordered. . .be the direct, anticipated consequence of the declaration, rather than something unrelated to it, the suit can be maintained under Rule 23(b)(2)").

30. FED. R. CIV. P. 23(C)(4).

the (c)(4) trial.[31] So long as the issue judgment is unequivocal and free of potential ambiguity, preclusion principles will apply in the follow-on proceeding. Below, we offer a case study in the application of these principles.

A. The FCA MDL Issue Class

The FCA MDL provides a beta-test for issue-classing in the setting of a mass tort MDL—albeit one that concerns product liability, and not personal injury, claims. In the FCA MDL, purchasers of certain Jeep and Chrysler vehicles filed cases in courts around the country, alleging serious defects relating to the gear-shifting system. The Judicial Panel on Multidistrict Litigation centralized the actions in the Eastern District of Michigan before District Judge David Lawson.[32] After Judge Lawson appointed a plaintiffs' steering committee to steward the litigation, the PSC sought certification of a damages class under Rule 23(b)(3). Judge Lawson, however, held the class not certifiable because "plaintiffs have not satisfied their burden of establishing the predominance of common issues over individual issues"—specifically, plaintiffs could not show that the element of reliance was susceptible to common proof.[33]

Nevertheless, Judge Lawson was mindful that the defendant's conduct in manufacturing and marketing automobiles does not vary from one plaintiff to another. Chrysler's conduct, in other words, presents issues that are common across all plaintiffs. Accordingly, while no party had sought or even raised the possibility of issue class treatment, the court sua sponte certified a class under Rule 23(c)(4) to address three specific liability questions, namely: (1) "whether the monostable gear shift has a design defect"; (2) "whether the defendant knew about the defect and concealed its knowledge from buyers"; and (3) "whether information about the defect that was concealed would be material to a reasonable buyer."[34]

Judge Lawson's questions appear well framed for purposes of generating preclusive findings of fact.[35] The judicial declaration resulting from the Rule 23(c)(4) trial, assuming the plaintiffs prevail, will readily be accorded binding effect in a subsequent damages action brought by any member of the (c)(4) class.

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31. Gilles & Friedman, *supra* note 4, at 1319 ("At the outset of the case, the judge [may] certify a (c)(4) class . . . and provide a crisp statement of the common issues to be tried in the (c)(4) trial. And at the close, the court [should] taken care to present clear jury interrogatories, with downstream preclusive effects in mind. The result would have been a piece of paper that each plaintiff could then take into her local trial court, entitling her to a binding declaration that certain core issues of her claim have been established as a matter of law.").

32. *In re* FCA USA LLC Monostable Elec. Gearshift Litig., 214 F. Supp. 3d 1354 (J.P.M.L. 2016).

33. FCA MDL Order, *supra* note 8.

34. *Id*.

35. In objecting to the certified issues, defendants argued that the definition of "design defect" varies from state to state. *See* Defendant FCA US LLC'S Reply Brief in support of its Motion to Decertify, *In re* FCA US LLC Monostable Elec. Gearshift Litig., MDL No. 2744 (Jun. 22, 2020), ECF No. 684. But even if there are, across states, several distinct verbal formulations for what constitutes a "design defect," the Court can easily ask the jury if each such test was met. This strikes us as the sort of thing courts do every day in approving jury verdict forms.

By straightforward application of issue preclusion—not the *Parklane Hosiery* variety but true collateral estoppel where complete mutuality exists—the defendants should be fully foreclosed from relitigating design defect, knowledge, concealment, and objective materiality. How far that gets any given plaintiff is a separate question: with these predicate facts established, a verdict of liability might follow *a fortiori* in some jurisdictions, while the plaintiff in others may yet be required to establish individual reliance or other liability elements. But either way, it stands to reason that the increased availability of the trial option places substantial settlement pressure on the defendants—at least, in cases where key liability issues are seriously contested.

B. The *Lexecon* Issue

In response to the district court's sua sponte certification of an issue class in the FCA MDL, the defendants moved for decertification.[36] Most significantly, for present purposes, they argued that the MDL court lacks jurisdiction to hold a class-action trial, including an issue class trial, for claimants whose cases were transferred via 28 U.S.C. § 1407. The MDL statute, after all, only sanctions transfer and centralization "for pre-trial purposes" and the Supreme Court held in *Lexecon* that judges may not transfer constituent cases to themselves for trial.[37] Instead, the MDL statute provides that transferred actions "shall be remanded" to the court of origination before trial.[38] On the defendants' argument in the FCA MDL, therefore, an issue class trial could at most determine the designated issues for those plaintiffs whose cases were originally filed in the Eastern District of Michigan.

As we write, the motion to decertify the class in the FCA MDL remains pending. But we do not see *Lexecon* principles as a serious impediment to the issue class model. Even if the Rule 23(c)(4) class at the issue trial were to consist only of plaintiffs who originally filed their cases in the MDL court, the transferred plaintiffs would still have compelling arguments for application of non-mutual offensive collateral estoppel based on the (c)(4) verdict.[39]

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36. Defendant FCA US LLC's Motion to Decertify the Class, *In re* FCA US LLC Monostable Elec. Gearshift Litig., MDL 2744 (E.D. Mich. May 18, 2020).

37. *See* Lexecon Inc. v. Millberg Weiss, 523 U.S. 26, 34 (1998) (when "pretrial proceedings have run their course," Section 1407 "obligates the [MDL] Panel to remand any pending case to its originating court").

38. 28 U.S.C. § 1407(a) ("Each action so transferred shall be remanded by the panel at . . . the conclusion of such pretrial proceedings to the district from which it was transferred . . . .").

39. More technically, in follow-on damages litigation brought by members of the (c)(4) class, the issue judgment would preclude re-litigation of the designated issues under the fully mutual (and usually nondiscretionary) version of issue preclusion. And irrespective of any state's preclusion laws, the federal judgment should be accorded full faith and credit if the follow-on case is brought by a member of the issue class in state court. By contrast, non-members of the issue class would be left to argue for application of *Parklane Hosiery*, where the discretion of a state or federal trial court to refuse application of estoppel principles is greater. Nonetheless, the case for application of non-mutual issue preclusion is compelling in this context because, among other reasons, the defendant's incentives and opportunities to fully and fairly litigate the issue were presumably high, given that the parties and the MDL court understood at the front end that the (c)(4) trial was intended to have broadly preclusive effects.

Moreover, plaintiffs can avoid the effects of *Lexecon* altogether by filing an issue class complaint in the MDL court. This issue class complaint is distinct from the familiar "master complaint" that a PSC typically files in mass-tort MDLs after transfer, and also from the superseding class action complaint that we see in the MDL class action context. A master complaint, often used in the mass tort arena, is merely an administrative device: the underlying individual tort cases, defined by their own individual complaints, retain their separate identities.[40] The master complaint serves as an organizing tool that provides the transferee court a basis to shape discovery and consider motions across cases, including motions to dismiss or for summary judgment.[41] Thus, the Supreme Court has recognized that the filing of a master complaint in the MDL transferee court does not affect the separate identity of the underlying individual cases.[42]

By contrast, in the class-action MDL context—for example, in antitrust or securities MDLs—class-action complaints purporting to represent a group, or groups, of plaintiffs are filed all over the country and then centralized in the MDL court, which then appoints class counsel and vests it with authority to file a superseding class action complaint. This document does not merely merge the constituent cases for pre-trial purposes, but fully *supplants* the antecedent class actions filed on behalf of similar groups of putative class members. Because the superseding class action complaint is filed in the transferee district, the MDL court has jurisdiction to try the class action consistent with *Lexecon*, no matter where the original class action complaints were filed.

So, what is the upshot here for Rule 23(c)(4) issue classes inside of mass-tort MDLs? We think the answer is clear. After MDL transfer, the PSC should file an issue class complaint on behalf of all claimants. The issue class complaint is not merely an administrative device, but rather a real complaint that provides a basis for trial in the MDL court on behalf of all members of the class, as defined in the issue class complaint and certified by the court. But the issue class complaint is not a superseding complaint. It does not supplant the underlying individual cases. Instead, after the issue class case is tried to conclusion, those individual cases

40. *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., 239 F.R.D. 450, 454 (E.D. La. 2006) (explaining that a master complaint is only an administrative device that "should not be given the status of an ordinary complaint"); *see also In re* Nuvaring Prods. Liab. Litig., MDL No. 1964, 2009 WL 2425391, at *2 (E.D. Mo. Aug. 6, 2009) (same).

41. For a recent example of a Master Complaint in a personal injury MDL, see Consolidated Consumer Class Action Complaint, *In re* Zantac (Ranitidine) Prods. Liab, Litig., MDL No. 2924 (S.D. Fl. June 22, 2020), ECF No. 889 (master complaint alleging that various companies involved in the manufacture, sale, distribution and repackaging of ranitidine failed to disclose cancer-causing compounds).

42. In *Gelboim v. Bank of Am. Corp*., 574 U.S. 405, 413 n.3 (2015), the Court recognized that "[p]arties may elect to file a 'master complaint' and a corresponding 'consolidated answer,' which supersede prior individual pleadings. In such a case, the transferee court may treat the master pleadings as merging the discrete actions," but that merger only extends "for the duration of the MDL pretrial proceedings." (Citation omitted). The underlying constituent cases "retain their separate identities" and must be transferred back under *Lexecon* at the end of pretrial proceedings. *Id* at 413.

retain their force and individual identity. They may proceed as individual cases wherever jurisdiction permits.

C. Other Procedural Considerations

Returning to the FCA MDL case study for issue-classing in the MDL context, two additional procedural considerations warrant discussion: class certification and common benefit attorneys' fees.

First is class certification. Because issue class actions are in fact standalone class actions for declaratory relief, we have previously observed that they should be certified under Rule 23(b)(2) and not (b)(3).[43] The hallmark of (b)(2), articulated by Professor Nagareda and enshrined into Supreme Court case law by Justice Scalia, is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them."[44] This test is always met in (c)(4) cases, where the questions relate solely to the *defendant's* conduct. Moreover, the opt-out right that attends (b)(3) class actions makes no sense in the (c)(4) context. The opt-out right protects the individual plaintiff's ability to control her damages case; it is not designed to insulate her from the application of collateral estoppel or other preclusion doctrines.[45] And in the issue class context, the individual plaintiff has total autonomy over her damages case: she remains at all times free to press or settle the claim as she likes.

Accordingly, we offer our gentle criticism of Judge Lawson's reliance upon Rule 23(b)(3) in certifying the issue class in the FCA MDL. We do not contend that certifying the class under (b)(3) was impermissible: the court was certainly correct in reasoning that common questions predominate with respect to the certified issues, and in rejecting the view that issue class certification under (b)(3) requires that common questions predominate with respect to the case as a whole.[46] But certifying under (b)(3) injects needless confusion by allowing plaintiffs an illusory opt-out right, the sole effect of which is to let each plaintiff elect whether the issue class judgment will bind him formally as a matter of issue preclusion or less formally as a matter of stare decisis or persuasive effect.

Another procedural question raised by (c)(4) issue-classing concerns common benefit attorneys' fees. In the FCA MDL, as in most mass tort MDLs, the court at an early stage approved a "common benefit protocol" that contemplates the PSC and its designees will perform work for the common

43. Gilles & Friedman, *supra* note 26, at 145 ("The proper vehicle for certifying an issue class . . . is Rule 23(b)(2), which specifically authorizes for certification of class actions seeking 'declaratory relief.'").

44. Wal-mart Stores, Inc. v. Dukes, 564 U.S. 338, 360 (2011) (quoting Richard A. Nagereda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

45. Gilles & Friedman, *supra* note 26, at 17–18 (observing that it is not "entirely clear what the right to opt out of a pure declaratory judgment suit even means, or how it might work. The intended consequence, presumably, would be simply to exempt the opt-out from the binding preclusive effect of the (c)(4) judgment. But even that is not assured by the act of opting out").

46. Martin v. Behr Dayton Thermal Prods. LLC, 896 F.3d 405, 413 (6th Cir. 2018).

benefit of all plaintiffs and, one way or another, will eventually be compensated for that work.[47] Assessments for common benefit work are effectuated in any number of ways, all of which include a judicial order that draws on a court's equitable powers to compel individually retained counsel in the MDL to pay a portion of their contingency fees to the PSC.[48] In some cases, the court's order will be further enshrined in the settlement agreement between the parties, with the defendant agreeing to pay the common benefit assessment directly into the common benefit fund established by the court's order.[49] In addition, the order creating the common benefit assessment may include fee-transfer agreements, where individually retained counsel sign form agreements engaging the PSC to perform common benefit work for a share of counsel's contingent fee.[50]

The MDL issue class complicates the question of how to compensate and incentivize common benefit counsel because there is no obvious mechanism to ensure common benefit contributions from issue class members who have no suit on file in the MDL, and who take the issue judgment and go file in state court. Nonetheless, we would not expect this problem to pose a serious disincentive to issue-classing, as many paths remain for common benefit counsel to be compensated. To the extent individual plaintiffs have cases on file in the MDL court, common benefit orders and fee-transfer agreements will be effective. And of course, if the issue-judgment drives a truly global settlement negotiated by the PSC, issue counsel—presumably the PSC—will be paid. Moreover, a clear order from the MDL court establishing the entitlement of issue class counsel to a share of eventual settlements and judgments ought to be accorded comity in the state court.[51] And the MDL court can direct defendants to advise the PSC of all state court cases leveraging the issue class judgment, enabling issue class counsel to seek intervention and press an application for fees under equitable common benefit principles.

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47. *See* Pretrial Order No. 3: Protocol For Common Benefit Work And Expenses, *In re* FCA Monostable Elec. Gearshift Litig., MDL No. 2744, 16-md-02744 (E.D. Mich. November 17, 2016), ECF No. 17.

48. *See* Lynn A. Baker & Stephen J. Herman, *Layers of Lawyers: Parsing the Complexities of Claimant Representation in the Mass Tort MDL*, 24 LEWIS & CLARK L. REV. 469, 475 n. 17 (2020) (describing court orders).

49. *See, e.g.*, Settlement Agreement Between Merck & Co., Inc. and [Plaintiff's Counsel] at 35 § 9.2: Common Benefit Fees and Reimbursement of Litigation Costs (Nov. 9, 2007), https://beasleyallen.com/wp-content/uploads/vioxx-master-settlement-agreement-with-exhibits.pdf [https://perma.cc/RV52-MVV7].

50. For critiques of the MDL court's authority over fees, *see generally* Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71 (2015); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010).

51. This enforceability of a federal MDL court's common benefit assessment on parallel state court proceedings has been litigated to varying results. *Compare In re* Genetically Modified Rice Litig., 764 F.3d 864 (8th Cir. 2014) (finding the MDL judge lacked authority to order plaintiffs' lawyers in state court suits to contribute a share of their fees to the MDL common benefit fund) *with In re* Avandia Mktg., Sales Pracs. & Prods. Liab. Litig., 617 Fed. Appx. 136 (3d Cir. 2015) (ruling that all settled claims, in both MDL and state court, were subject to 7% common benefit assessment).

III
THE NEGOTIATION CLASS AND THE PRESCRIPTION OPIATE MDL

In this part, we examine the negotiation class – as conceived by Professors McGovern and Rubenstein and adopted by Judge Polster in the Prescription Opiate MDL. At the outset, this litigation presented as a public emergency created by the ongoing opioid epidemic—a uniquely compelling case for pulling out all the stops to achieve swift resolution. In addition, the heterogeneous composition of the claimants—ranging from small rural fire departments to behemoth entities like Los Angeles County—heightened the need for a device that would allow PSC counsel to credibly promise that it could deliver large claimants in a settlement.[52] The urgency and radical heterogeneity made the Prescription Opiate MDL an attractive vehicle for negotiation class treatment. But, as we show in this Part, the device proved too "adventurous" for the appellate court.

A. The Prescription Opiate MDL

In the Prescription Opiate MDL, a divided panel of the Sixth Circuit rejected the negotiation class concept.[53] The division ran deep, turning on the limits of judicial creativity in applying Rule 23. Judge Eric Clay's majority opinion held the district court abused its discretion by adopting a procedure that "is not authorized by the structure, framework, or language of Rule 23."[54] Specifically, the court disapproved the certification of a class for a purpose other than the two specified in the rule—litigation and settlement. That which is not authorized under Rule 23, the majority reasoned, is forbidden.[55] The majority parried the argument, advanced by plaintiffs and the district court that explicit authorization cannot be required for the negotiation class. After all, settlement classes were widely accepted by courts, including the Supreme Court, long before the 2018 amendment that added an explicit settlement class procedure. Specifically, Judge Clay found a pre-amendment textual hook for the practice of certifying settlement classes in the longstanding language calling for "notice to class members of dismissal *or compromise"* of a class action.[56] "Unlike settlement classes under the pre-2018 Rule," the majority then concluded, "there is no textual basis" in Rule 23 "for the existence of a negotiation class."[57]

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52. *See In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375, 1378-79 (J.P.M.L. Dec. 5, 2017) (transfer order listing the myriad plaintiffs, including Native American tribes, hundreds of localities, hospitals, insurance companies and others).

53. *In re* Nat'l Prescription Opiate Litig., 976 F.3d 664, 671–78 (6th Cir. 2020).

54. *Id*. at 676.

55. Citing *Wal-mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011), and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997), the majority opinion thus held: "The Supreme Court has also emphasized that we are to be 'mindful that the Rule as now composed sets the requirements [courts] are bound to enforce," that the Rule "limits judicial inventiveness," and that "[c]ourts are not free to amend a rule outside the process Congress ordered." *Id*. at 672.

56. *Id*. at 673.

57. *Id*.

By contrast, Judge Karen Nelson Moore's dissent lauds the inventiveness of District Judge Polster—and his professorial muses—in crafting procedures designed to hasten global resolution of a pressing social issue. Her opinion delights in the "bespoke five-stage certification process [that] emerged from an academic chrysalis" in the work of Professors McGovern and Rubenstein.[58] The district court, she argued, "has breathed life into a novel concept – a class certified for negotiation purposes – to aid in its Promethean duty to secure the just, speedy, and inexpensive resolution of this byzantine multidistrict litigation."[59] Rather than "manacle district courts that innovate within the Rules' textual borders," Judge Moore admonishes, "we should be in the business of encouraging . . . such resourcefulness."[60]

It is beyond the ambition of this Article to engage the merits of the debate between Judge Clay and Judge Moore concerning the limits of judicial adventurism. But assuming the negotiation class concept is viable in the first instance, the question of its utility will depend in part on how courts apply Rule 23(b)(3) in the negotiation class context. We thus focus on the class certification inquiry, as performed by Judge Polster and reviewed by the appellate court.

Judge Polster certified the negotiation class in the Prescription Opiate MDL, holding "that common issues predominate over individualized issues with respect to both the [federal] RICO claims" and particular issues regarding whether certain defendants complied with the Controlled Substances Act (CSA). In certifying the class, the district court thus relied on Rule 23(b)(3) and, with respect to the CSA issues, (c)(4).

The Sixth Circuit reversed, holding that "in certifying a negotiation class, the district court has papered over the predominance inquiry."[61] The main problem, the majority held, was that the court found only that common issues predominated with respect to certain federal claims or, more narrowly yet, with respect to certain issues, and yet the class was certified to negotiate a resolution of the whole case:

> [T]he court's analysis was made incomplete by its decision to restrict its reasoning to the common federal claims in order to certify a negotiation class. Rule 23's structure does not permit the court to evade a proper (b)(3) analysis by certifying a negotiation class based upon a few common federal issues, while at the same time empowering the class to negotiate settlement on virtually all claims brought by the class members.[62]

And Rule 23(c)(4), the panel held, does not obviate the problem: "The issue class device permits a court to split common issues off for class treatment; it does not provide an end-run around the weighty requirements of Rule 23(b)(3)."[63]

On the majority's analysis, then, even if the negotiation class concept might otherwise be viable, class certification requires that common issues predominate

58. *Id*. at 684.
59. *Id*. at 677.
60. *Id.*
61. *Id*. at 675.
62. *Id*. at 676.
63. *Id*. at 675.

for the case as a whole. But common issues do not predominate, the majority held, because the overall case featured "myriad state law claims that arguably divide the putative class members."[64] This view of Rule 23(b)(3) is particularly fatal when one considers the utility of the negotiation class in mass tort MDLs, which are often characterized by numerous and varying issues of state law.

B. Analyzing the Decertification

We are skeptical of the Sixth Circuit's Rule 23(b)(3) analysis for two reasons. First, to the extent that a multiplicity of divergent state law issues impacts the (b)(3) analysis it is because those issues render a case unmanageable. At least in theory, any case could be divided into multiple subclasses—one for each state, if necessary—which could certainly make a class action unmanageable but would not necessarily implicate individual issues.[65] The multiplicity of state-law claims, fundamentally, goes to the *manageability* feature of (b)(3), not the predominance requirement. And under *Amchem*, the distinction is critical. *Amchem* holds that the question of whether a trial would be "manageable" under Rule 23(b)(3)(D) is inapplicable in the settlement context—where "the proposal is there be no trial"—but that the predominance requirement applies fully.[66]

In the context of a class certified for the sole purpose of negotiating a settlement, the Rule 23(b)(3) analysis should presumably be the same as in the settlement class context. And yet, the Sixth Circuit majority applied the (b)(3) test reserved for litigation classes, by leaning heavily on manageability concerns that the court mislabeled as predominance issues.

Second, even if disparate state laws were understood as a predominance problem, we would still question the Sixth Circuit's application of Rule 23(b)(3). Here, too, the reason stems from *Amchem*. Unlike manageability, the *predominance* requirement applies with full force in the settlement class context. The reason the Court gave was that, unless a proposed settlement class is certifiable for trial, class counsel may well lack the leverage required to negotiate a fair and adequate settlement of class members' claims.[67] The deal, in other words, will lack the indicia of fairness afforded by adversary process. This rationale, however, is unpersuasive in the negotiation class context, where the whole point of the multi-step process is to increase plaintiffs' leverage in other

64. *Id*.

65. FED. R. CIV. P. 23(c)(5) states that "[w]hen appropriate, a class may be divided into subclasses that are each treated as a class under this rule." *See also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.23 at 337 (2016) ("Subclasses must be created when differences in the positions of class members require separate representatives and separate counsel.").

66. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 620 (1997).

67. *Id*. at 621 (1997) ("If a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, and the court would face a bargain proffered for its approval without benefit of adversarial investigation.") (citations omitted).

ways—not by reference to trial risk, but by solving collective action problems and enabling class counsel to present defendants with a global deal package.

Finally, before turning to a discussion of the relative attributes of the issue class and negotiation class models, we pause to consider the district court's treatment of issue-classing in the Prescription Opiate MDL. In our view, the district court's invocation of Rule 23(c)(4) in certifying a negotiation class was badly misplaced. It may be that a class is certifiable under Rule 23(a) and (b) not only for litigation or settlement, but for negotiation as well—this is the nub of the division among the Sixth Circuit panel members. But (c)(4) is, by necessity, specific to the litigation context. Judge Polster did not certify a class of plaintiffs to go negotiate with defendants over whether their conduct met the standards of care set forth in the CSA. He certified a class to negotiate the resolution of claims.

Accordingly, Judge Polster could certainly certify the CSA issues—and probably multiple other issues as well—for a Rule 23(c)(4) trial. What is more, if a negotiation class is otherwise viable under (b)(3), the court could order an issue class trial while the negotiation class is seeking resolution. Such a combined approach could well hasten the global resolution the negotiation class was designed to pursue—although not without some perverse effects.[68] But whatever the interplay between the issue class and the negotiation class, it should be clear that (c)(4) is not an avenue to certification of a class for negotiation purposes.[69]

IV

THE ISSUE CLASS, THE NEGOTIATION CLASS AND THE STATUS QUO

The MDL issue class, as we have conceived it, and the negotiation class proposed by Professors McGovern and Rubenstein both look to Rule 23 to help solve problems in mass tort MDLs. Both are concerned with decoagulating the MDL system. "Growing dockets have long been the mother of judicial invention," declares a recent article on the negotiation class idea.[70] And the quest for invention seems well-founded. More than half of all private civil lawsuits are

68. Specifically, we have regarded it as a virtue of the issue class model that it promotes litigant autonomy, because the individual litigant armed with the issue judgment is well equipped to pursue her separate damages claim. Introducing a negotiation class into this equation, on the McGovern-Rubenstein model, would eliminate this core benefit by forcing the individual plaintiff to exercise or forfeit her opt-out right at an early stage. Assuming she does not opt out of the negotiation class, can she later take a favorable issue class judgment into state court to pursue damages? Does that depend on whether the effort to negotiate global resolution is unsuccessful? And if so, shouldn't the model provide for a formal declaration of impasse, liberating individual class members to pursue their separate claims? To say the least, these waters are uncharted.

69. Given the 6th Circuit decision decertifying the negotiation class, this may be the last we see of this innovative effort. In any event, we think the negotiation class would be of limited utility in quotidian physical injury MDLs where defendants are able to reach comprehensive resolution of mass claims via settlements with each of the (typically) thirty or so firms representing the bulk of plaintiffs —without resorting to barring the exit doors.

70. Francis McGovern, Elizabeth Burch & William Rubenstein, *The Negotiation Class*, 104 JUDICATURE 1, 12 (Spring 2020), https://judicature.duke.edu/articles/the-negotiation-class/ [https://perma.cc/LWR2-LHUK].

within MDLs, according to recent research.[71] And because mass-tort MDLs are so populous, "quite a few judges" have come to "view the MDL process as a crucible for inventiveness," in Professor McGovern's words.[72] The problem motivating this judicial creativity is not so much size as stasis—the perception reflected in the oft-repeated quip that "multi-district litigation is like the old Roach Motel ad: 'Roaches check in – but they don't check out.'"[73]

So, what are the benefits and detriments of the issue class model—relative both to the negotiation class and status quo bellwether-centric models—when viewed from the distinct perspectives of the defendants, plaintiffs, and MDL courts? We begin with the defense. While the negotiation class and the issue class share little beyond reliance on Rule 23, that is apparently sufficient to draw charges of judicial adventurism from defendants with regard to both. In the FCA MDL, the defendants wasted no time invoking the Prescription Opiate MDL to argue that Judge Lawson's certification of an issue class exceeds the bounds of permissible judicial creativity, contending the court was focused on "improving the 'efficiency' of an MDL" at the expense of the "showing required by Rule 23."[74] But we think the judicial adventurism objection to the use of (c)(4) in mass tort MDLs is unlikely to gain traction. Whatever the merits of the panel-majority's view in the Prescription Opiate MDL that procedures not specifically identified in Rule 23 are prohibited, the issue class procedure is specifically anchored in the text. And yet, we expect that defendants will continue to reach for conservative objections to issue-classing—if not because the procedure is unauthorized then because it is presumably radical in some other sense.

The specific objection we expect from the defense side harkens back to *Rhone-Poulenc*, where Judge Posner warned of the *in terrorem* effects of class certification in the mass tort context—the idea that a certified class presents such a massive threat that defendants will rationally be forced to settle even unmeritorious cases.[75] While these concerns have been widely criticized as unmoored from Rule 23,[76] some courts have recognized "hydraulic pressure on

71. *See* Baker & Herman, *supra* note 48*,* at 470.

72. McGovern, Burch & Rubenstein, *supra* note 70, at 17.

73. *See e.g., In re* TJX Companies Retail Sec. Breach Litig., 584 F. Supp. 2d 395, 405 (D. Mass. 2008) (attributing quote to Samuel Issacharoff); *In re* NFL Players' Concussion Injury Litig., No. 2:12-md-02323-AB, 2019 U.S. Dist. LEXIS 4318, at *23 (E.D. Pa. Jan. 7, 2019); Tyler v. Michaels Stores, Inc., 150 F. Supp. 3d 53, 66 n.29 (D. Mass. 2015).

74. Defendant FCA US LLC's Memorandum in Support of its Motion to Decertify at 1, *In re* FCA US LLC Monostable Elec. Gearshift Litigation, No. 16-md-02744 (E.D. Mich. May 18, 2020) (quoting *In re* Nat'l Prescription Opiate Litig., 856 F.3d 838, 844 (6th Cir. 2020) (decision certifying appeal under Rule 23(f))).

75. *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298, 1300 (7th Cir. 1995) (explaining that issue class certification may impose "intense pressure to settle" in order avoid massive potential liability and possible bankruptcy at the hands of a single jury entrusted with "the fate of an entire industry").

76. Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1430 (2003) ("Given the sad state of the duress theory, judges hardly are justified in using it at all, let alone in employing incendiary phrases like legalized blackmail. The hard work of thinking the theory through has not been done. Judges should focus on this aspect of the project and leave the task of demonizing plaintiffs, trial lawyers, and trial judges to others."); Jeffrey Stempel, *Class Actions and*

defendants to settle" as a factor "which weighs in the superiority analysis'" prescribed by (b)(3).[77] Another textual hook for the in terrorem objection, specific to issue classes, is found in (c)(4)'s language permitting issue classes "[w]hen appropriate"—a standard that is surely mushy enough to accommodate the *in terrorem* objection.

And yet, the *in terrorem* effects argument is uniquely weak in the issue class context. If class certification exerts overwhelming pressure to settle, that pressure hales from the aggregation of all *damages* claims—that is, from the fact that the defendant, if it loses, will incur liability to *all* victims, including those who would never have sued. This font of pressure is specific to Rule 23(b)(3) damages classes and is plainly absent in the issue class context. So, we would expect the objection to carry even less weight in (c)(4) cases than it does in damages classes generally.

A closely related argument against issue classing and in favor of the status quo ante is that the stakes of a single winner-take-all mass-tort issues trial are too high for the plaintiffs as well as the defendants. While defendants frame their concerns in terms of *in terrorem* effects, the plaintiffs will complain that they get better at trying their case over time, and a one-time showdown pretermits their learning curve at an early stage.[78]

We question whether it is plausible that plaintiffs get better at prosecuting the claim and yet defendants do not get better at defending it. We also question why a court would care. And the objection that the stakes are too high for a single trial should be unmoving, given that courts hold hugely consequential trials all the time—from bet-the-company intellectual property cases to antitrust class actions and capital murder cases. These trials are also single-shot affairs; like the Super Bowl, they are not structured as best-of-seven series. Courts afford the parties all the discovery and process that is due and then hold a single trial for all the marbles. Why mass tort should be any different is not clear.

Nor should the other objections that we attributed earlier to PSCs carry weight with the MDL court. First, the argument that bifurcation depresses aggregate recoveries ought not be a concern to the MDL judge. Putting aside whether the magnitude of aggregate recovery is a proper concern for courts in the first instance—and we would allow that it could be, as a proxy for aggregate deterrence—the specific concern that bifurcation depresses recoveries is particularly weak when directed to the court. In certifying an issue class, the MDL judge will understand that the court overseeing a subsequent damages trial will only exclude liability evidence if it is unduly prejudicial. And it is unclear why the

Limited Vision: Opportunities for Improvement Through a More Functional Approach to Class Treatment of Disputes, 83 WASH. U. L.Q. 1127, 1229 (2005) (observing that those asserting the "extortionate impact of class treatment" are "long on rhetoric and the 'cosmic anecdote' . . . [and that] the 'litigation blackmail' argument against class treatment is essentially a Potemkin village[:] It has an initial superficial persuasiveness but upon closer inspection appears to be an illusion").

77. *In re* LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430, 545 (S.D.N.Y. 2018) (quoting Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 190, 192 (3d Cir. 2001)).

78. *See* McGovern, *supra* note 25.

MDL court should take steps to ensure the damages jury hears prejudicial evidence.

More broadly, there is little reason to believe the objectives of the court are better served by the current bellwether-centric regime than by issue classing. In terms of fostering prompt resolution, we would expect issue-classing to outperform bellwether practice. To be sure, when bellwether juries return repeated blockbuster verdicts, defendants will presumably be moved to proffer aggregate settlement proposals with docket-clearing potential, as we saw recently in the Roundup MDL.[79] But such outcomes do not appear to be the norm; more often, results are mixed. In the Vioxx MDL, for example, there were sixteen trials involving seventeen plaintiffs at the federal and state levels, spanning the course of more than a decade.[80] The power of the bellwether tool to clear congested MDL dockets, then, appears sporadic.

The issue class likewise looks to clear dockets by increasing aggregate settlement prospects, but it does so systematically, not sporadically. The expected value of a settlement, at the broadest level, is the product of two variables—the probability of winning and the dollar-value of a win. In cases where the certified issue is fully determinative of liability, the issue class trial will set the probability level for negotiators at either one-hundred percent or zero.[81] Of course, to the extent the certified issues are less than dispositive on the question of liability, these values will be correspondingly less absolute. But still, establishing clear answers to hotly contested liability questions will presumably have a profound impact on expected value.

On the axis of time, moreover, the issue class has considerable advantages over the bellwether model. All else being equal, we would expect the issue class trial to take less time than a single bellwether, let alone multiple bellwethers. The issue class trial, after all, excludes individual-plaintiff-focused issues, which comprise a substantial portion of the trial time in any bellwether case. By prioritizing the issue class proceeding, moreover, the MDL court can ensure that no individual-plaintiff-focused discovery or motion practice impedes the onset of the issue class trial. And while the issue class trial is likely to be heavily litigated, given the high stakes, the same is true for bellwethers, where the participants are acutely aware that the trial has ramifications that go beyond the individual

79. *In re:* Roundup Prods. Liab. Litig., MDL No. 2741 (S.D. Ill.); *see* Patricia Cohen, *Roundup Maker to Pay $10 Billion to Settle Cancer Suits*, N.Y. TIMES (June 24, 2020), https://www.nytimes.com/2020/06/24/business/roundup-settlement-lawsuits.html [https://perma.cc/6UWZ-L3Z6] (reporting that, in the wake of the bellwether verdict and other jury verdicts, Bayer had agreed to "pay more than $10 billion to settle tens of thousands of claims while continuing to sell the product without adding warning labels about its safety").

80. The Vioxx litigation ran for over a decade, and the docket contains over 65,600 entries. *In re* Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La.).

81. As we have explained elsewhere, if the certified issues do not go a substantial distance towards establishing liability, then the case is generally a poor candidate for issue class treatment. *See* Gilles & Friedman, *supra* note 26, at 110–11.

parties.[82] On the flip side, the issue class procedure will cost the MDL court time, to the extent that class certification decisions are appealed. But given the straightforward class certification analysis (whether under Rule 23(b)(2) or the "broad view" of (b)(3)),[83] we would expect few applications for appellate review to be granted under Rule 23(f)—at least once the device no longer appears novel to circuit courts.

Finally, we speculated above that some PSCs might be concerned that the issue class procedure impedes aggregate resolutions because the issue verdict could embolden individually retained lawyers to decline offers to settle their portfolios of cases. But if this is a concern—and we don't know that it is—we question whether it is a concern the court should be expected to share. From a policy perspective, is it a virtue or a vice that the issue class procedure increases the plaintiff's access to trials and concomitant bargaining leverage? And from the more parochial perspective of MDL docket management, is it a welcome development if individual law firms, with portfolios of clients attached, decamp for their courts of origin, or state courts, to try or settle their cases?

The negotiation class and issue class are based on diametrically opposing answers to these questions. The negotiation class proceeds from the premise that the ability of individual plaintiffs—or groups of plaintiffs—to decline settlement and pursue their cases is an obstacle to the goal of clearing dockets. The negotiation class can succeed only if claimants are convinced to surrender their autonomy at the front end. If large claimants exercise their front-end opportunity to opt out—which it seems to us they likely would, in order to preserve their bargaining leverage[84]—then the negotiation class fails. But if they are willing to surrender their otherwise-inherent veto power over any offer made to them, as a trade-off for fielding a global proposal, then the negotiation-class device has the potential to clear mass-tort MDL dockets with an efficacy that issue-classing and status quo bellwether practice cannot match.

V

CONCLUSION

The negotiation class abjures adjudicatory processes in favor of an essentially political procedure aimed specifically at negotiated resolution. The status quo bellwether regime employs adjudication, but only in the service of settlement

82. *See, e.g.*, Fallon et al., *supra* note 22, at 2366 (observing that "bellwether trials are often exponentially more expensive for the litigants and attorneys than a normal trial. . .as coordinating counsel often pull out all the stops for bellwether trials given the raised stakes").

83. Gilles & Friedman, *supra* note 26, at 113 (describing the debate among commentators and courts on whether (b)(3) demands that common issues predominate for the damages class action as a whole (the so-called "narrow view"), or only with respect to the issue for which issue class treatment is sought (the "broad view")).

84. While the negotiation class procedure approved by Judge Polster nominally holds open the possibility that the court will allow a second opt-out right at the time of settlement, it is hard to imagine the parties or the court would seriously consider that option. A second opt-out right would seemingly undermine the entire model, which is based on foreclosing exit by large stakeholders.

negotiations, where negotiators' positions are informed by bellwether trial results, among other inputs.

The issue class model, by contrast, revolves around adjudication. It forces the parties to present their best case and looks to the jury to find facts and apply facts to law. It does not spurn aggregate settlement as a goal but ensures that any subsequent resolution is informed by a binding ruling on key liability issues—one that occurred in public and that forms a part of the common law. The decisions of individual plaintiffs whether to sign onto an agreement—and the decisions of plaintiffs' attorneys whether to settle their portfolios of cases—are informed by the issue class judgment.

Whether the adjudication-centricity of the issue class model makes it superior to the other modes of dispute resolution is a normative question. But we would argue the system as a whole has a stake in ensuring that negotiated resolutions are relatively more influenced by the facts and law, and relatively less by sources of leverage that are exogenous to the merits—whether that is the perceived wherewithal of individually retained counsel to prosecute its portfolio of cases, or the perceived ability of a PSC to deliver large claimants in a universal settlement package.

So, with all that said, what are the prospects that MDL courts will turn to issue-classing as a way to alleviate docket congestion in mass-tort cases? It may just be a matter of time. *Rhone-Poulenc* and *Castano* are no longer good law and the inertial ripples they sent across the waters of mass tort practice won't go on forever.[85] Prior to *Rhone-Poulenc*, many judges were using the issue class tool in mass tort cases—and doing so at the urging of plaintiffs' counsel.[86] And even in the years since, there have been some savvy PSC counsel that have tried to certify issue classes in mass tort MDLs, including in Vioxx, where the application only failed because the district court was bound by *Castano*.[87] Whether PSCs will come

85. *See* Houseman v. U.S. Aviation Underwriters, 171 F.3d 1117, 1126–28 (7th Cir. 1999) (rejecting *Rhone-Poulenc*'s Seventh Amendment analysis); *In re* Deepwater Horizon, 739 F.3d 790, 806–07 (5th Cir. 2014) (reversing *Castano*'s predominance analysis). *See also* Klay v. Humana, Inc., 382 F.3d 1241, 1272 (11th Cir. 2004) (rejecting *Castano*'s 'mature torts' analysis); Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996) (rejecting *Castano*'s predominance analysis).

86. As Judge Weinstein observed, before *Rhone-Poulenc* and *Castano* became entrenched, numerous courts had found Rule 23(c)(4)(A) "particularly useful in the mass tort context." Simon v. Philip Morris Inc., 200 F.R.D. 21, 29–30 (E.D.N.Y. 2001) (collecting cases); *see, e.g.*, *Valentino*, 97 F.3d at 1230–314; Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473–74 (5th Cir. 1986) (affirming class action plan involving trial of common factual issues regarding health hazards of asbestos, to be followed by individual damages cases); *In re* Copley Pharm., Inc., 161 F.R.D. 456, 461 (D. Wyo. 1995) ("[T]his Court finds Fed.R.Civ.P. 23(c)(4)(A) a highly efficient way to preserve both judicial economy and the rights of the parties in the case."); *see also* Susan E. Abitanta, *Bifurcation of Liability and Damages in Rule 23(b)(3) Class Actions: History, Policy, Problems, and a Solution*, 36 SW. L.J. 743, 753 (1982) ("The . . . economies of handling as much as possible of the complex case in one proceeding prompt the courts whenever possible to structure the action through rule 23(c)(4)(A) to achieve a manageable suit.").

87. In *Vioxx*, the PSC argued that the court had the "ability to determine particular issues during the trial," under (c)(4), and thereby produce "res judicata effect" for class members. Plaintiffs' Steering Committee's Motion for Certification of a Nation-Wide Class Action for Personal Injury and Wrongful Death, *In re* Vioxx Prods. Liab. Litig., 239 F.R.D. 450 (E.D. La. 2006) (MDL No. 1657), 2005 WL

to embrace issue-classing more generally, or whether MDL judges drive the process on their own, as Judge Lawson has in the FCA MDL, the prospects appear to us good that issue-classing will emerge as a significant tool in the administration of mass tort litigation.

3487961, at *18. However, because the court was bound by the Fifth Circuit's ruling in *Castano*, the PSC acknowledged that it was constrained to argue that the Vioxx case *as a whole* satisfied Rule 23(b)(3). *See id.* at *18 n.19. Relying on *Castano*, the district court then denied certification on the grounds that individual issues predominated with respect to the case as a whole. *In re* Vioxx Prods. Liab. Litig., 239 F.R.D. 450 (E.D. La. 2006).