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"CARVING AT THE JOINT": THE PRECISE FUNCTION OF RULE 23(c)(4)

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INTRODUCTION

Most leading scholars agree that Federal Rule of Civil Procedure 23(c)(4) permits a class action to be certified for particular issues that meet the requirements of Rules 23(a) and (b), even if other portions of the action would not qualify for class treatment.[1] Nevertheless, some commentators and practitioners, relying primarily on dicta from two Fifth Circuit decisions,[2] posit a "circuit split" regarding the interpretation of Rule 23(c)(4) and dispute the propriety of certifying issue classes or subclasses.[3] Yet, while the Fifth Circuit has referred to Rule 23(c)(4) as a mere "housekeeping" measure that district courts may consider only after finding that the cause of action as a whole has met the requirements of Rules 23(a) and (b),[4] all other circuits that have considered this question have rejected the Fifth Circuit approach to issue classes.[5] Moreover, the most recent Fifth Circuit decisions demonstrate that the weak "circuit split" occasioned by *Castano v.*

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1. *See, e.g.*, 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1790 (3d ed. 2005); 8 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 24:24 (4th ed. 2002); FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION § 30.17 (3d ed. 1995).

2. *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 745–46 n.21 (5th Cir. 1996); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 422 (5th Cir. 1998).

3. *See, e.g.*, Laura Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567 (2004); Mark A. Perry, *Issue Certification Under Rule 23(c)(4): A Reappraisal*, 62 DEPAUL L. REV. 733 (2012). It should be noted, however, that many of those that disagree with the consensus interpretation of Rule 23(c)(4) are advocates on behalf of defendants resisting class certification—Laura Hines, for example, represented Philip Morris in *Castano*, 84 F.3d 734, and Mark Perry represented Wal-Mart in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

4. *See Castano*, 84 F.3d at 745–46 n.21.

5. *See, e.g.*, Gates v. Rohm & Haas Co., 655 F.3d 255, 272–73 (3d Cir. 2011); Williams v. Mohawk Indus., 568 F.3d 1350, 1359–60 (11th Cir. 2009); *In re* Nassau Cnty. Strip Search Cases, 461 F.3d 219, 226 (2d Cir. 2006); Smilow v. Sw. Bell Mobile Sys., Inc., 323 F.3d 32, 41 (1st Cir. 2003); Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 439 (4th Cir. 2003); Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910, 911–12 (7th Cir. 2003); Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996).

American Tobacco Co. and *Allison v. Citgo Petroleum Corp.* has all but vanished,[6] leaving the federal circuits unanimous in holding that Rule 23(c)(4) authorizes certification of issue classes when the common, certified issues are pivotal to the entire claim and "carved at the joint" rather than enmeshed with individual issues.[7]

The Seventh Circuit's recent interlocutory decision in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* illustrates these class action principles.[8] In *McReynolds*, the Seventh Circuit certified a class under Rules 23(b)(2) and 23(c)(4) to determine whether a retail brokerage firm's account distribution and teaming policies have a disparate impact on African-American brokers (financial advisors) and, if so, whether the policies are justified by a business necessity.[9] In a decision authored by Judge Posner, the court explained that a finding of disparate impact liability would necessitate individual trials to determine the actual effect of firm policies on specific class members, yet emphasized that "at least it wouldn't be necessary in each of those trials to determine whether the challenged practices were unlawful."[10] This Seventh Circuit opinion represents the ideal approach to issue class certification because it "advances the fundamental goal of Rule 23 itself; that is, [it] advances a fair and judicially efficient disposition of the entire action, even if it does not completely resolve the ac-

6. *See, e.g.*, *In re* Rodriguez, 695 F.3d 360, 369 n.13 (5th Cir. 2012) ("The bankruptcy court's limited grant of class certification is especially appropriate because 'a court should certify a class on a claim-by-claim basis . . . .'" (quoting Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 976 (5th Cir. 2000))); Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 626–29 (5th Cir. 1999) (holding that an issue class met predominance and superiority when certified issues were "not only significant but also pivotal" despite individualized issues of causation, comparative negligence, and damages).

7. *See* McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 491 (7th Cir. 2012) ("'Class action treatment is appropriate and is permitted by Rule 23 when the judicial economy from consolidation of separate claims outweighs any concern with possible inaccuracies from their being lumped together in a single proceeding for decision by a single judge or jury. Often . . . these competing considerations can be reconciled . . . by *carving at the joints* of the parties' dispute. 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 issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings.'" (emphasis added) (quoting *Mejdrech*, 319 F.3d at 911)).

8. *See* Jessie Kokrda Kamens, *Experts Say Recent Seventh Circuit Ruling May Not Make 'Issue Certification' Trendy*, *in* 13 CLASS ACTION LITIGATION REPORT 284, 284 (2012) (quoting Professor John C. Coffee, Jr.'s statement that the ruling in *McReynolds* is "an encouraging decision by Judge Posner" that demonstrates the judicious use of issue certification).

9. *See McReynolds*, 672 F.3d at 490 ("The *only* issue at this stage is whether the plaintiffs' claim of disparate impact is most efficiently determined on a classwide basis rather than in 700 individual lawsuits." (emphasis added)).

10. *Id.* at 491.

tion."[11] Consequently, even if Fifth Circuit dicta once created a circuit split regarding the proper use of issue certification, that dicta should be disregarded in favor of the well-reasoned, judicious analysis of the Seventh Circuit.

II. FIFTH CIRCUIT DICTA AND THE SEMANTICS OF THE ISSUE CLASS "CIRCUIT SPLIT"

The notion that issue classes should be certified only as a "housekeeping" measure stems specifically from a footnote in *Castano v. American Tobacco Co.*[12] and a divided opinion in *Allison v. Citgo Petroleum Corp.*[13] Therefore, a review of these decisions is the first step in analyzing the issue class "circuit split." When the dicta that gave rise to this split is viewed in context, it is clear that the divide between the Fifth Circuit and all other circuits is much more semantic than real.[14]

A. Castano v. American Tobacco Co.*: The Origin of the "Circuit Split"*

The unique facts of *Castano* undoubtedly dictated the outcome in that case. "In what may [have been] the largest class action ever attempted in federal court,"[15] the district court certified a "Frankenstein's monster"[16] class of all Americans addicted to nicotine (and their heirs) during the prior half century. The court conditionally certified for class jury trials the issues of both "core liability," which resulted from the tobacco industry's conduct, and punitive damages. They did not, however, certify the issues of injury-in-fact, proximate cause, reliance, comparative negligence, affirmative defenses, or compensatory damages.[17] The plaintiffs asserted nine different causes of action based on a "novel and wholly untested theory" of liability that would be governed by the law of all fifty states.[18] On appeal, the Fifth Circuit held that the district court abused its discretion in finding that the requirements of predominance and superiority were met, particu-

11. Janet C. Evans & Kari Thoe Crone, *Much Ado About Nothing?: The Quarrel over Predominance in Issue Certification*, *in* ABA SECTION OF LITIGATION, CLASS ACTIONS TODAY 26, 26 (2008).

12. Castano v. Am. Tobacco Co., 84 F.3d 734, 745–46 n.21 (5th Cir. 1996).

13. Allison v. Citgo Petroleum Corp., 151 F.3d 402, 422 (5th Cir. 1998).

14. *See, e.g.*, Evans & Crone, *supra* note 11.

15. *Castano*, 84 F.3d at 737.

16. *Id.* at 745 n.19 (quoting Letter from Charles Alan Wright, Professor, University of Texas, to N. Reid Neureiter, Associate, Williams & Connolly LLC (Dec. 22, 1994)).

17. *See id.* at 738–39.

18. *See id.* at 737.

larly given that the court would be required to guess how fifty states' laws would apply to the plaintiffs' novel legal theory.[19] In a footnote often quoted as support for the issue class circuit split, the Fifth Circuit classified Rule 23(c)(4) as a "housekeeping" measure:

> Severing the defendants' conduct from reliance under [R]ule 23(c)(4) does not save the class action. A district court cannot manufacture predominance through the nimble use of subdivision (c)(4). The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever common issues for a class trial.[20]

In its reasoning, the *Castano* court followed the analysis of an earlier Seventh Circuit decision—*In re Rhone-Poulenc Rorer Inc.*[21]—that had similarly reversed issue certification.[22] *Rhone-Poulenc* was a mass tort action brought on behalf of thousands of hemophiliacs who had contracted AIDS through blood transfusions.[23] Like *Castano*, *Rhone-Poulenc* involved a huge putative class asserting a novel theory of liability, governed by the law of fifty states, which threatened the defendants with potentially catastrophic liability exposure.[24] Only thirteen cases had been tried under the plaintiffs' theory, of which the defendants had won twelve.[25] The district court had certified the issue of defendants' negligence for a single class jury trial, leaving class members to file separate actions to litigate the overlapping issue of comparative negligence before separate juries around the country.[26] The Seventh Circuit held that the district court erred in trying to separate the issue of the defendants' negligence from the plaintiffs' comparative negligence because issues certified under Rule 23(c)(4) must be "carve[d] at the joint" of the elements of the claim so that "the same issue is [not] reexamined by different juries."[27]

Notwithstanding the dicta from the footnote, the *Castano* court quoted and adopted *Rhone-Poulenc*'s "carve at the joint" standard for

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19. *See id.* at 737, 741–44.

20. *Id.* at 745–46 n.21.

21. *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995).

22. *See Castano*, 84 F.3d at 741, 746–47 nn.22–23, 748, 750–51; *see also* W. Russell Taber, *The Reexamination Clause: Exploring Bifurcation in Mass Tort Litigation*, 73 DEF. COUNS. J. 63, 66 (2006) (noting that *Castano* followed the approach taken by the Seventh Circuit in *Rhone-Poulenc*).

23. *Rhone-Poulenc*, 51 F.3d at 1294.

24. *Id.* at 1294–98.

25. *Id.* at 1296.

26. *Id.* at 1297.

27. *Id.* at 1302–03.

issue certification.[28] Carving at the joints of a substantive claim prevents Rule 23(c)(4) from being used to manufacture predominance by peeling off individual issues until only common subissues remain. In fact, as a result of its practicality, this approach has been adopted in other circuits as well.[29] Viewed in this light, it is far from clear that the *Castano* footnote rises to the level of a "circuit split."

B. Allison v. Citgo Petroleum Corp.*: The "Widening" of the "Circuit Split"*

According to some commentators, the Fifth Circuit's decision in *Allison v. Citgo Petroleum Corp.* expanded the issue class divide between the circuits.[30] Yet, as with *Castano*, reasoned scrutiny of the *Allison* opinion demonstrates the weakness of this assertion. In *Allison*, a divided panel of the Fifth Circuit relied on both *Rhone-Poulenc* and *Castano* in affirming the district court's decision to utilize consolidation under Rule 42, rather than class certification under Rule 23, in an employment discrimination action.[31] The *Allison* plaintiffs sought compensatory and punitive damages on behalf of more than 1,000 employees "working in seven different departments, and alleging discrimination over a period of nearly twenty years."[32] The plaintiffs had asked the court to certify their disparate impact claim, while holding in abeyance their request to certify the pattern-or-practice claim and the compensatory and punitive damages claims pending the outcome of the disparate impact class trial.[33] The *Allison* majority disapproved of this piecemeal approach to class certification and noted that the entire disparate impact claim could not be certified because, like the pattern-or-practice claim, it would require a finding that each class member was harmed by the challenged employment practices.[34] Because the pattern-or-practice claim would be tried to a jury, it could not be held in abeyance while the class proceeded to judgment on the disparate impact claim.[35]

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28. *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 750–51 (5th Cir. 1996).

29. *See, e.g.*, Gates v. Rohm & Hass Co., 655 F.3d 255, 273 (3d Cir. 2011) (rejecting the rigidly sequential approach enunciated in the *Castano* footnote and endorsing the same "carve at the joints" standard for forming issue classes as the Fifth and Seventh Circuits).

30. *Cf.* Paul Karlsgodt, *Supreme Court Declines to Take on the Issue of Issue Certification*, CLASS ACTION LAWSUIT DEF. (Oct. 10, 2012), http://www.classactionlawsuitdefense.com/2012/10/10/supreme-court-declines-to-take-on-the-issue-of-issue-certification.

31. *See* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 425–26 (5th Cir. 1998).

32. *Id.* at 419–20.

33. *Id.* at 420–21.

34. *Id.* at 424.

35. *Id.*

Nonetheless, in response to a request for rehearing, the *Allison* majority issued a statement qualifying its decision:

> The trial court utilized consolidation under [R]ule 42 rather than class certification under [R]ule 23 to manage this case. We review that decision for abuse of discretion and we find no abuse in this case. We are not called upon to decide whether the district court would have abused its discretion if it had elected to bifurcate liability issues that are common to the class and to certify for class determination those discreet liability issues.[36]

This statement casts doubt on the status of the panel majority's opinion regarding issue certification. At a minimum, the majority's rehearing statement rendered *Allison* dicta with respect to a case in which the court *does* bifurcate liability issues that are common to the class and certify for class determination the discrete issues of class-wide disparate impact liability and injunctive relief.[37]

III. Any "Circuit Split" Surrounding Rule 23(c)(4) Issue Certification Has Disappeared

The foregoing discussion reveals that, even at its outset, the issue class "circuit split" was tenuous. In fact, under *Castano* and *Allison*, the Fifth Circuit would likely certify an issue class like the one certified by the Seventh Circuit in *McReynolds*.[38] But assuming that these Fifth Circuit decisions did create a circuit split, it may now be safely disregarded for at least two additional reasons. First, the language of and recent amendments to Rule 23 unequivocally support utilizing issue classes when doing so promotes the efficiency of the litigation. Secondly, more recent Fifth Circuit decisions interpret Rule 23(c) in accordance with both the consensus view of the other circuits and the language and history of the rule.

A. The Plain Meaning, Purpose, and Recent History of Rule 23(c)(4)

Rule 23(c)(4) provides, "When appropriate, an action may be brought or maintained as a class action with respect to particular issues."[39] For example, issue class actions are appropriate for determin-

36. *Id.* at 434.

37. *See, e.g.*, McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 490 (7th Cir. 2012); *see also infra* notes 61–67 and accompanying text.

38. *See McReynolds*, 672 F.3d at 490; *see also* Evans & Crone, *supra* note 11, at 28 ("Both before and after *Castano*, the courts certified issue, or partial, class actions only after concluding that it was both manageable and beneficial to the entire action to do so."); *see also supra* notes 14–37 and accompanying text.

39. Fed. R. Civ. P. 23(c)(4).

ing liability in actions in which the need for individualized damages determinations would otherwise defeat predominance:

> This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.[40]

In addition, the recent rule-making history of Rule 23 demonstrates that it was intended as much more than a simple "housekeeping rule." Prior to 2007, Rule 23(c)(4) governed both issue classes and subclasses. This prior formulation of the rule specified that, in considering whether to certify an issue class, a court should apply the requirements of Rules 23(a) and (b) to the particular issue class or subclass, not to the cause of action as a whole: "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall *then* be construed and applied accordingly."[41]

This application of the Rule aligns with the purpose of subclasses because, as mentioned above, a class as a whole often includes members with divergent interests. In the case of such divergent interests, class members could rarely, if ever, satisfy the requirements of typicality and adequacy of representation except through the use of subclasses.[42] Accordingly, limiting the use of Rule 23(c)(4) to cases that qualify for class treatment as a whole would render authorization of issue classes and subclasses superfluous, if not meaningless.[43]

To further emphasize the point, as part of the 2007 Style Project to clarify and simplify the Federal Rules of Civil Procedure, the issue class and subclass provisions were split into consecutive subdivisions:

> (4) *Particular Issues.* When appropriate, an action may be brought or maintained as a class action with respect to particular issues.
>
> (5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.[44]

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

41. Memorandum from Lee H. Rosenthal, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure (July 20, 2006) (emphasis added); *see also* Gunnells v. Healthplan Servs., 348 F.3d 417, 439 (4th Cir. 2003).

42. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 864 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626–27 (1997).

43. *See Gunnells*, 348 F.3d at 439–40.

44. FED. R. CIV. P. 23(c).

At the same time, the concluding phrase of the former Rule 23(c)(4)—"and the provisions of this rule shall then be construed and applied accordingly"—was deleted.[45] As the committee notes to the 2007 amendment explain, however, this amendment effected no substantive change in Rule 23(c)(4): "These changes are intended to be stylistic only . . . . As part of the general restyling, intensifiers that provide emphasis but add no meaning are consistently deleted."[46] This amendment to Rule 23 renders its language plain and clear—particular issues and subclasses that meet the requirements of Rules 23(a) and (b) may be certified for class action treatment, even if the action as a whole could not.

B. Recent Fifth Circuit Cases Mark the End of the "Circuit Split"

Recent decisions confirm that the Fifth Circuit is in accord with the consensus view of the other circuits, as well as the language and history of Rule 23(c)(4). For example, in *Mullen v. Treasure Chest Casino, LLC*, decided only one year after *Allison*, the Fifth Circuit certified an issue class without requiring that the class as a whole meet predominance, thus resolving the "circuit split" on its own accord.[47] Furthermore, *Robertson v. Monsanto Co.*—an unpublished, *per curiam* opinion—described a liability issue class followed by individual proceedings on causation and damages as "the 'usual' class action method of resolving mass-tort claims."[48]

Indeed, shortly after the Seventh Circuit's most recent decision in *McReynolds*,[49] the Fifth Circuit, in *M.D. v. Perry*, held that a putative class lacking Rule 23(a)(2) commonality and Rule 23(b)(2) cohesiveness could nevertheless be certified through subclasses under Rule 23(c)(5), the companion provision to Rule 23(c)(4), as long as the claims of each subclass (not the action as a whole) met the requirements of Rules 23(a) and (b).[50] The *Perry* court vacated an order certifying a class of all children who are, or will later be, in Texas's foster care system because the plaintiffs failed to establish commonality of

45. *See* FED. R. CIV. P. 23(c).

46. FED. R. CIV. P. 23(c) advisory committee's note.

47. *See, e.g.*, Mullen v. Treasure Chest Casino, LLC, 186 F.3d 482, 626–29 (5th Cir. 1999) (certifying certain common liability issues under federal law despite the need for follow-on jury trials to decide causation, damages, and comparative negligence).

48. Robertson v. Monsanto Co., 287 Fed. App'x 354, 362–63 (5th Cir. 2008) (citations omitted).

49. *See* McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012).

50. *See* M.D. v. Perry, 675 F.3d 832, 848–49 (5th Cir. 2012).

issues and class cohesiveness.[51] Although the "'amorphous' superclaim" as a whole did not qualify for class treatment, the Fifth Circuit held that the district court could, on remand, consider certification of subclasses.[52] Whether subclasses are appropriate, the Fifth Circuit held, should be analyzed by the claims of individual subclasses rather than the action as a whole.[53]

As discussed above, issue classes and subclasses are governed by parallel, consecutive provisions of Rule 23(c) that were once joined in Rule 23(c)(4), but later divided in a stylistic, nonsubstantive revision of the rules. As such, there is no principled reason to differentiate between issue classes and subclasses in their relationship to the requirements of Rules 23(a) and (b). Accordingly, *Perry* signals a shift in the Fifth Circuit toward the view of the consensus jurisdictions in its approach to Rule 23(c).

Even more recently, in *In re Rodriguez*, the Fifth Circuit affirmed the certification of a narrow Rule 23(b)(2) class after the bankruptcy court redefined the class in accordance with Rule 23(c)(4).[54] In that case, a putative class of debtors alleged that their mortgage servicer charged fees in violation of the Federal Rules of Bankruptcy Procedure and sought injunctive relief as well as damages.[55] Upon hearing the motion for class certification, the bankruptcy court denied certification of the Rule 23(b)(3) and Rule 23(b)(2) classes for the debtors' damages claims.[56] However, the court granted the narrow certification of an injunctive relief class to determine whether the mortgage servicer could collect certain unapproved fees.[57]

The Fifth Circuit upheld the certification of this narrow class, finding that the charge of allegedly unauthorized fees was a "common behavior . . . that led to the class members allegedly being harmed in the same way."[58] The court reasoned that after a classwide decision on injunctive relief, the issue of "whether [the mortgage servicer] must seek Court approval for fees that it imposes" would be "resolved as to all class members."[59] More importantly, the Fifth Circuit recognized the utility of Rule 23(c)(4), noting that the Rule "explicitly recognizes

51. *Id.* at 841–43, 846, 849.

52. *Id.* at 848.

53. *Id.* at 848–49.

54. *In re* Rodriguez, 695 F.3d 360, 367 n.8 (5th Cir. 2012) (noting the propriety of the bankruptcy court's redefined "single-issue injunctive class").

55. *Id.* at 362–63.

56. *Id.* at 363.

57. *Id.* at 363–64.

58. *Id.* at 365.

59. *Id.* (internal quotation marks omitted).

the flexibility that courts need in class certification by allowing certification with respect to particular issues and division of the class into subclasses."[60] Because the *In re Rodriguez* court affirmed an issue class that the bankruptcy court carved out, this case firmly establishes that the Fifth Circuit has joined the consensus regarding Rule 23(c).

IV. *McREYNOLDS v. MERRILL LYNCH*: THE EPITOME OF ISSUE CLASS CERTIFICATION

McReynolds is a particularly interesting case because it thoroughly illustrates how a court can carve at the joint under Rule 23(c)(4). The plaintiffs in that case consist of a class of 700 African-American financial advisors who allege that their employer, Merrill Lynch, Pierce, Fenner & Smith, discriminated and continues to discriminate against them in violation of Title VII. Specifically, the employee class alleges that certain company policies have a disparate impact on African-American financial advisors, which results in their being compensated significantly less than similarly situated, white financial advisors. The Seventh Circuit framed the details of the company policies as follows:

> Merrill Lynch . . . delegates discretion over decisions that influence the compensation of all the company's 15,000 brokers ("Financial Advisors" is their official title) to 135 "Complex Directors." Each of the Complex Directors supervises several of the company's 600 branch offices, and within each branch office the brokers exercise a good deal of autonomy, though only within a framework established by the company.
>
> Two elements of that framework are challenged: the company's "teaming" policy and its "account distribution" policy. The teaming policy permits brokers in the same office to form teams . . . , and the aim in forming or joining a team is to gain access to additional clients . . . .
>
> The teams are formed by brokers, and once formed a team decides whom to admit as a new member. Complex Directors and branch-office managers do not select the team's members.
>
> Account distributions are transfers of customers' accounts when a broker leaves Merrill Lynch and his clients' accounts must therefore be transferred to other brokers. Accounts are transferred within a branch office, and the brokers in that office compete for the accounts. The company establishes criteria for deciding who will win the competition. The criteria include the competing brokers' records of revenue generated for the company and of the number and investments of clients retained.
>
> . . . [A manager's] exercise of . . . discretion is influenced by the two company-wide policies at issue: authorization to brokers, rather

60. *In re* Rodriguez, 695 F.3d at 369 n.13 (internal quotation marks omitted).

> than managers, to form and staff teams; and basing account distributions on the past success of the brokers who are competing for the transfers. Furthermore, team participation and account distribution can affect a broker's performance evaluation, which under company policy influences the broker's pay and promotion. The plaintiffs argue that these company-wide policies exacerbate racial discrimination by brokers.
>
> The teams, they say, are little fraternities (our term but their meaning), and as in fraternities the brokers choose as team members people who are like themselves. If they are white, they, or some of them anyway, are more comfortable teaming with other white brokers . . . . [T]here is bound to be uncertainty about who will be effective in bringing and keeping shared clients; and when there is uncertainty people tend to base decisions on emotions and preconceptions, for want of objective criteria.[61]

As noted, Merrill Lynch's account distribution policy establishes specific criteria for distributing the accounts of brokers who leave the firm to the remaining brokers. "The criteria include the competing brokers' records of revenue generated for the company and of the number and investments of clients retained"—records that may be distorted by prior account distributions and teaming opportunities from which African-American brokers were disproportionately excluded. As a result, Merrill Lynch's policies can create a "vicious cycle" that compounds the disadvantages for African-Americans:

> A portion of a team's pre-existing revenues are transferred within a team to a new recruit, who thus starts out with that much "new" revenue credited to him or her—an advantage, over anyone who is not on a team and thus must generate all of his own "new" revenue, that translates into a larger share of account distributions, which in turn helps the broker do well in the next round of such distributions. This spiral effect attributable to company-wide policy and arguably disadvantageous to black brokers presents another question common to the class, along with the question whether, if the team-inflected account distribution system does have this disparate impact, it nevertheless is justified by business necessity.[62]

In reversing the judgment of the district court, which had denied class certification, the circuit court explained, "The incremental causal effect (overlooked by the district judge) of those company-wide policies—which is the alleged disparate impact—could be most efficiently determined on a classwide basis."[63]

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61. McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 488–89 (7th Cir. 2012).

62. *Id.* at 490.

63. *Id.*

On remand, the district court found that the proposed disparate impact class met the elements of Rule 23(a), as well as Rules 23(c)(4) and 23(b)(2).[64] Accordingly, it issued a Class Certification Order, which certified a class action "limited to determining the issues of: (i) whether Defendant's teaming and/or account distribution policies have or had an unlawful disparate impact on the certified class; and (ii) if so, the appropriateness of any classwide final injunctive and corresponding declaratory relief."[65]

The same commentators who argue that an issue class circuit split exists among the federal circuit courts also argue that the issue class in *McReynolds* was improperly certified. Essentially, their contention is that the class fails to satisfy the requirements of Rule 23(b)(2) because it is not clear, on an individual basis, whether the compensation of black financial advisors was disparately impacted by the company's policies. Nevertheless, the specific calculation of compensation per broker was not at issue in the Seventh Circuit's opinion; rather, the only issue was "whether the plaintiffs' claim of disparate impact is most efficiently determined on a classwide basis rather than in 700 individual lawsuits."[66] As the court aptly stated, "There isn't any feasible method—certainly none has been proposed in this case—for withholding injunctive relief until a series of separate injunctive actions has yielded a consensus for or against the plaintiffs."[67]

Looking forward, the court noted that if disparate impact is found and there are no common issues regarding pecuniary relief, the plaintiffs' monetary claims would have to be pursued individually,[68] but that the individual follow-on trials would be much more efficient if "the question whether Merrill Lynch has violated the antidiscrimination statutes" does not have to be "determined anew in each case."[69]

Even accepting for the sake of argument that the circuits were divided on the appropriate use of issue classes when the Seventh Circuit decided *McReynolds*, the court's studied application of Rule 23 in that opinion is, on its own merits, sufficient to abolish the circuit split alto-

64. McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 05 C 6583, 2012 WL 5278555 (N.D. Ill. July 13, 2012).

65. *Id.*

66. *McReynolds*, 672 F.3d at 490.

67. *Id.* at 491.

68. *Id.* at 492 ("The stakes in each of the plaintiffs' claims are great enough to make individual suits feasible. Most of Merrill Lynch's brokers earn at least $100,000 a year, and many earn much more, and the individual claims involve multiple years.").

69. *Id.* However, the Seventh Circuit did not decide how any follow-on trials should be adjudicated, leaving that issue for the district court on remand. Given the interlocutory nature of its ruling, the Seventh Circuit took no position on who should adjudicate these separate suits—a jury, a judge, or a special master. *See* 42 U.S.C. § 2000e-5(f)(5) (2006).

gether. In the face of numerous and multifaceted facts, the Seventh Circuit deftly used Rule 23(c)(4) to promote judicial efficiency—which is, after all, the purpose of the Rule—by separating an essential issue from the tangle of common class claims, all the while preserving the due process rights of both parties.[70] Consequently, in addition to being properly decided, the *McReynolds* opinion actually exemplifies the ideal application of Rule 23(c)(4).

V. CONCLUSION

The certification of issue classes, whether in the Fifth Circuit or in the remaining "consensus" jurisdictions, depends on the factual circumstances surrounding the proposed issue class, not the particular gloss the court puts on Rule 23(c)(4). This analysis not only invalidates the purported "circuit split," but also comports with both the language and the purpose of Rule 23.

Even after the *McReynolds* decision, some commentators focus on the "circuit split"[71] or otherwise seek to undercut the utility of Rule 23(c)(4).[72] Yet, *McReynolds* did not violate the provisions Rule 23 by breaking off "claims" or "defenses"—if it had, the Supreme Court would not have declined certiorari in the case. Indeed, the focus should be on what the Seventh Circuit got right in the *McReynolds* decision. The court did not create a dramatic new interpretation of Rule 23(c)(4), but rather used the Rule in the way it was meant to be used to promote judicial efficiency. In other words, the court implemented an often overlooked class action mechanism to carve out the issue of an employer's liability for disparate impact discrimination and simplify the case as a whole while driving at the heart of the purpose of Title VII.

Given the fact sensitivity of the issue class inquiry, some variation among courts is inevitable.[73] However, such variance, without investigation of its cause, does not necessarily support the conclusion that

70. Under the Seventh Circuit's decision, Merrill Lynch remains free to ask for a jury trial in any follow-on trials.

71. *See* Karlsgodt, *supra* note 30 ("The federal circuits are split on whether issue certification is allowed to resolve discrete issues short of a full claim.").

72. *See* Perry, *supra* note 3, at 741–43 ("How can 'liability' be established without allowing plaintiffs to prove reliance, causation, or other elements of their claim? How can 'liability' be established without allowing defendants to prove their affirmative defenses?").

73. For instance, the Fifth Circuit has approved issue classes despite the presence of significant issues requiring individualized determination—like causation, comparative fault, and damages—while circuit courts in the "consensus" jurisdictions have rejected issue classes in a variety of other circumstances. *Compare* Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 626–29 (5th Cir. 1999) (certifying certain common liability issues under federal law despite the need for follow-on jury trials to decide causation, damages, and comparative negligence), *with* McLaughlin

dissension exists among courts. Indeed, the Supreme Court's silence on the matter simply bears out the fact that there is no circuit split.[74] Just last year, after granting certiorari in *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court denied a petition for certiorari seeking review of a class action certified for certain consumer liability issues under Rule 23(b)(3) in which the issues of causation, damages, and statute of limitations were left to individual proceedings.[75]

In sum, a fifteen-year-old footnote has no bearing on the issue class analysis.[76] The "circuit split" regarding Rule 23(c)(4) was artificial from the beginning and, in any case, has now been adequately resolved. As embodied in *McReynolds*, all circuits unanimously hold that Rule 23(c)(4) authorizes certification of an issue class or subclass when the common, certified issues are pivotal to the entire claim and "carved at the joint."

v. Am. Tobacco Co., 522 F.3d 215, 221–34 (2d Cir. 2008) (reversing issue class certification because of individualized issues of reliance, injury, damages, and statute of limitations).

74. The Supreme Court has previously considered and denied myriad petitions for certiorari involving issue classes. *See, e.g.*, Carnegie v. Household Int'l, 376 F.3d 656, 661 (7th Cir. 2004) (holding that individualized relief hearings "need not defeat class treatment of the question whether the defendants violated RICO"), *cert. denied*, 543 U.S. 1051 (2005); Gunnells v Healthplan Servs., Inc., 348 F.3d 417, 421 (affirming an issue class to determine whether an administrator mismanaged a health plan and contributed to its collapse, while reserving damages issues for individual trials), *cert. denied*, 542 U.S. 915–16 (2004); *Mullen*, 186 F.3d at 622 (affirming certification of common liability issues of federal claims triable by a jury, to be followed by individual jury trials on causation, damages, and comparative negligence), *cert. denied*, 528 U.S. 1159 (2000); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1302–04 (7th Cir. 1995) (reversing class certification of a negligence issue in an immature tort theory, in which the district court failed to "carve at the joint" in severing common issues from overlapping issues to be tried individually), *cert. denied*, 516 U.S. 867 (1995).

75. Pella Corp. v. Saltzman, 606 F.3d 391, 396 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 998 (2011).

76. *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 745–46 n.21 (5th Cir. 1996).