

“Abandoned Claims” in Class Actions: Implications for Preclusion and Adequacy of Counsel

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INTRODUCTION

Plaintiff class counsel sometimes seek class certification for only some of the possible claims to which the class members are entitled. The reasons may include to avoid (or take advantage of) venue or jurisdictional limitations, to prevent removal to federal court of a state-court class action, to evade evidentiary issues that could be harmful to existing claims, or simply to drop claims as to which the plaintiffs had little hope of success. It sometimes results because there are both class and individual remedies requiring different modes of evidentiary presentation. It might be done in order to qualify for a Rule 23(b)(2) class action for declaratory or injunctive relief (as opposed to damages) so as to avoid the more stringent requirements of a Rule 23(b)(3) class action for damages.¹ It may also be done in order to make a class action more likely to be certified. In recent years, it has been used to avoid the stricter requirements for “predominance of common questions” under Rule 23(b)(3) class certification. For example, class members may have a claim under both the state consumer protection act and common law fraud, but the fraud claim is not asserted because individual reliance would be required and the class action would fail to satisfy the predominance requirement. Finally, class counsel may define the class more narrowly, for example, limiting the time period, geographical area, or other characteristics for class eligibility, in order to make a more cohesive class that could be certified.²

Such limitation of claims may be accomplished by not pursuing all possible claims when filing the original complaint, or in a motion to

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¹ See FED. R. CIV. P. 23(b).

² See *Gomez v. Ill. State Bd. of Educ.*, 117 F.R.D. 394, 397 n.2 (N.D. Ill. 1987) (“It is unquestioned, of course, that the court has the discretion to redefine a class under appropriate circumstances to bring the action within Rule 23.”); *Perdue v. Murphy*, 915 N.E.2d 498, 510 (Ind. Ct. App. 2009) (“[A] court can redefine the class in order to sustain the lawsuit.”).

amend or sever claims sometime after the suit is filed. The term “abandoned claims” has been applied to the latter and, in the eyes of some, carries a pejorative connotation that valid claims are being jettisoned to the detriment of the class members. Challenges to class certification have increasingly been made on the ground that class counsel are not adequate if they fail to raise all possible claims, and therefore the class cannot be certified. The challengers view failure to raise all possible claims as splitting the cause of action, thereby leaving the class members at risk that a later court will find the omitted claims to be precluded.

I. THE PRECLUSIVE EFFECT OF SEPARATING CLASS EQUITABLE CLAIMS FROM INDIVIDUAL DAMAGE CLAIMS

The U.S. Supreme Court, in *Cooper v. Federal Reserve Bank of Richmond*,³ established that a class action for injunctive relief under Rule 23(b)(2) does not preclude subsequent individual claims for damages.⁴ It held that a suit by employees alleging individual discrimination in employment was not precluded by a finding in a previous 23(b)(2) class action (in which they were class members) that the employer did not engage in a pattern or practice of discrimination.⁵ Although the district court had found the statistical and anecdotal evidence insufficient to establish a pattern or practice under a claim of *disparate impact*, individual class members might still prove discrimination against them under a *disparate treatment* claim.⁶ The Court reasoned that the purpose of Rule 23 would be frustrated if a district court had to litigate each individual claim in a class action.⁷ The Court noted that the district court had “pointedly refused” to decide the claims of the absent class members.⁸ The district court had not formally severed the claims before deciding the class claim of disparate impact, or reserved a right of the individual class members to sue in the future for their individual disparate treatment claims. However, the Court implied that by “pointedly refusing” to decide the individual claims, the district court had avoided the impact of res judicata as to them.⁹ It stated:

³ *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867 (1984).

⁴ *Id.* at 876.

⁵ *Id.* at 880.

⁶ *Id.* at 879–80.

⁷ *Id.* at 880.

⁸ *Id.*

⁹ *Id.*

Whether the issues framed by the named parties before the court should be expanded to encompass the individual claims of additional class members is a matter of judicial administration that should be decided in the first instance by the District Court. Nothing in Rule 23 requires as a matter of law that the District Court make a finding with respect to each and every matter on which there is testimony in the class action. Indeed, Rule 23 is carefully drafted to provide a mechanism for the expeditious decision of *common* questions. Its purposes might well be defeated by an attempt to decide a host of individual claims before any common question relating to liability has been resolved adversely to the defendant.¹⁰

II. CHIPPING AWAY AT *COOPER*

Following *Cooper*, it could be said that a “class action suit seeking only declaratory and injunctive relief does not bar subsequent individual damage claims by class members, even if based on the same events.”¹¹ However, as the risk of preclusion began to be raised in challenges to class certification on the ground of inadequacy of counsel, courts began chipping away at the *Cooper* holding. The critical factor became the decision of class counsel to split the cause of action. For example, in the 1999 case *Zachery v. Texaco Exploration & Production, Inc.*,¹² a Texas federal district court denied certification of a Title VII and § 1981 action for racial discrimination on the ground that the class representatives had omitted monetary claims in order to qualify as a Rule 23(b)(2) class action.¹³ The court said:

The facts in this case are distinguishable from *Cooper*. First, *Cooper* was decided before the 1991 Civil Rights Act amendments which allow for jury trials in disparate treatment claims seeking compensatory and punitive damages. . . .

¹⁰ *Id.* at 881 (emphasis added).

¹¹ *Hiser v. Franklin*, 94 F.3d 1287, 1291 (9th Cir. 1996); *see also Fortner v. Thomas*, 983 F.2d 1024, 1031 (11th Cir. 1993) (“It is clear that a prisoner’s claim for monetary damages or other particularized relief is not barred if the class representative sought only declaratory and injunctive relief, even if the prisoner is a member of a pending class action.”); *Norris v. Slothouber*, 718 F.2d 1116, 1117 (D.C. Cir. 1983) (“A suit for damages is not precluded by reason of the plaintiff’s [previous] membership in a class for which no monetary relief is sought.”); *In re Jackson Lockdown/MCO Cases*, 568 F. Supp. 869, 892 (E.D. Mich. 1983) (“[E]very federal court of appeals that has considered the question has held that a class action seeking only declaratory and injunctive relief does not bar subsequent individual suits for damages based on the same or similar conditions.”).

¹² *Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230 (W.D. Tex. 1999).

¹³ *Id.* at 246.

The Court is not concerned with what would happen if the class in this case is certified and *fails to prevail* on its class action for disparate treatment. Under *Cooper*, the class members could then bring individual suits for discrimination. What concerns the Court is the effect of a decision, if a class is certified, in which the class proposed here *prevails*. The Plaintiffs have dropped their claim for monetary damages, but have not dropped their claim for class-wide disparate treatment. If a Court certifies a class in this case and the class prevails on this issue, no one will receive compensatory or punitive damages because the seven Plaintiffs have unilaterally chosen not to seek them. Whether this bars the other class members from later seeking compensatory damages is an issue that greatly concerns the Court.¹⁴

In denying class certification, the *Zachery* court concluded that “the named Plaintiffs are asking the class members being represented here to risk waiving their right to monetary damages solely so the action for disparate treatment can proceed as a class action.”¹⁵ It made no mention of the concern expressed in *Cooper* that the purpose of a class action “might well be defeated by an attempt to decide a host of individual claims before any common question relating to liability has been resolved adversely to the defendant.”¹⁶ Indeed, the concern that all the individual claims would have to be tried in the class action if not split off would likely be seen as confirming that the case could not be certified as a class action. The emphasis was now on whether not asserting individual compensatory claims constituted splitting the cause of action and, if there were any risk of preclusion, the representation would be inadequate and class certification would have to be denied. There was no consideration of the historic importance of the class action as a device to compensate for and deter employment discrimination,¹⁷ nor of the longtime practice of permitting such bifurcation of employment discrimination cases, nor of the extensive practice of “hybrid” and “issues” class actions to allow segmenting of actions under the flexible administration of the class action rule.

The *Zachery* court noted in its decision that “there appears to be no clear cut right to opt out of a Rule 23(b)(2) class action.”¹⁸ That

¹⁴ *Id.* at 243.

¹⁵ *Id.* at 244.

¹⁶ *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 881 (1984).

¹⁷ See Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 816 (2004).

¹⁸ *Zachery*, 185 F.R.D. at 244. Specifically, the court observed:

was true at that time, but Rule 23 was amended in 2003 to permit the court to provide for notice and presumably opt-out in (b)(2) class actions.¹⁹ Whether the possibility that the certifying judge would order notice and opt-out would have made a difference in the decision cannot be known. In addition, *Zachery* gave no consideration to the possibility that procedures might be adopted to foreclose the risk of preclusion under the particular circumstances, such as a court making a formal reservation of the claims that are not certified.

III. THE TEXAS SUPREME COURT WEIGHS IN

Texas Supreme Court rulings have particularly distinguished *Cooper* as to the risk of preclusion and pursued the path of denying class certification based on inadequacy of counsel. In *Citizens Insurance Co. of America v. Daccach*,²⁰ applying the Texas class counterpart to Rule 23(b)(3), the court reversed the certification of a class of insurance policyholders who sought damages for breach of contract, fraud, negligent misrepresentation, and violation of the Texas Insurance Code, but who chose to pursue only the Texas Securities Act claim (for sale of securities without registration).²¹ The Texas Supreme Court found that by “abandoning” other claims that arose out of the same conduct of the insurance company, the plaintiff had split its cause of action and was not an adequate representative of the class, which was subjected to the risk of preclusion of its other claims.²²

The Supreme Court almost addressed the issue of res judicata and the availability of opt-out in a class action certified under Rule 23(b)(2) [in] *Ticor Title Ins. Co. v. Brown*[, 511 U.S. 117 (1994) (per curiam)] Unfortunately, the Court chose at the last minute not to address the issue on which it had granted *certiorari*. *Ticor* was the second in a set of lawsuits arising from the same circumstances.

Zachery, 185 F.R.D. at 244 (citation omitted).

¹⁹ FED. R. CIV. P. 23(c)(2)(A) (“For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.”). Since a principal purpose of notice is to provide information useful for opting out, if a court deems notice advisable in a (b)(2) class, it might be reasonable for it to provide a right to opt out. See *Holmes v. Cont’l Can Co.*, 706 F.2d 1144, 1160 (11th Cir. 1983) (holding that, under the circumstances, refusal to allow members to opt out under Rule 23(b) in a hybrid class action was an abuse of discretion). But see FED. R. CIV. P. 23(c)(2) advisory committee’s notes to 2003 amendments (noting that classes certified under Rule 23(b)(1) or (2) have no right to opt out, thus reducing the need for notice); *Rahman v. Chertoff*, 530 F.3d 622, 626 (7th Cir. 2008) (“Members of a Rule 23(b)(2) class do not receive notice and can’t opt out.”). Some courts, however, have provided for opt-out in (b)(2) classes. See *infra* note 53.

²⁰ *Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430 (Tex. 2007).

²¹ *Id.* at 460.

²² *Id.*

The court rejected the plaintiffs' argument that only claims that *could have been certified* as part of an earlier class action are barred under the principles of preclusion.²³ It cited *Zachery*, among other cases, as "requiring the trial court to assess the 'risk' that uncertified claims may be forever barred."²⁴ "A class representative's decision to abandon certain claims," it said, "may be detrimental to absent class members for whom those claims could be more lucrative or valuable, assuming those class members do not opt out of the class," and "[a]bandoning such claims . . . could undermine the adequacy of the named plaintiff's representation of the class."²⁵ It concluded that, "[w]hile it is not per se inappropriate to abandon claims or for the trial court to certify a specific-issue class, the requirements of class certification must still be met."²⁶ It remanded to the trial court "to evaluate [the class action] prerequisites in light of the claims abandoned by the class representative."²⁷

The limitation of claims in *Daccach* did not involve the *Cooper* Rule 23(b)(2) situation, but the court took pains to distinguish *Cooper*. It saw that *Cooper*'s finding of no preclusion as based on the class claim for a pattern or practice of discrimination was distinct from the claims of individual discrimination.²⁸ "We read *Cooper* not as an exception to *res judicata*," it said, "but as an application of its elements—a subsequent claim might not be barred if it does not involve *the same factual issues* that were litigated in the prior class action, a situation that can arise in the unique context of Title VII pattern and practice litigation."²⁹ This is a curious distinction of *Cooper* since the claims that were dropped in *Daccach* also would not seem to involve "the same factual issues" as the retained claim (i.e., the common law claims would have had different factual elements than the Texas Insurance Code claim) and, therefore, like *Cooper*, the omitted claims would not be precluded. But apparently *Daccach* viewed *Cooper* as only applying to the unique Title VII situation in a (b)(2) class action.³⁰ *Daccach* also observed that *Cooper* had expressly noted the

²³ *Id.* at 451.

²⁴ *Id.* at 457.

²⁵ *Id.*

²⁶ *Id.* at 460.

²⁷ *Id.*

²⁸ *Id.* at 454.

²⁹ *Id.* (emphasis added).

³⁰ The court in *Daccach* cited the Fifth Circuit case of *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 425 (5th Cir. 1998), as "distinguishing *Cooper* and stating that a subsequent disparate impact class action will be barred by *res judicata* and collateral estoppel because it will inevitably contain the same factual issues as were litigated in the pattern or practice class ac-

lower court’s “pointed refusal to decide the plaintiff’s individual claims.”³¹ However, it undertook no further discussion of whether formal action by a certifying court, either by refusing to litigate and thereby reserving certain claims for the future, or by formally severing the claims (with notice to the class members), would overcome a conclusion that preclusion would apply for splitting the cause of action.

Daccach also addressed the Texas counterpart of Rule 23(c)(4) (“[A]n action may be brought or maintained as a class action with respect to particular issues.”).³² It adopted the approach taken by the Fifth Circuit in *Castano v. American Tobacco Co.*,³³ that the rule “is a housekeeping rule that allows courts to sever the common issues for a class trial,”³⁴ but does not alter the requirement that common issues must predominate as to both those issues certified and those not.³⁵ Other courts have disagreed, finding that the authorization for “issues” classes provides a management device for a court to certify an issues class action in which common issues would predominate and that predominance would be satisfied as to that class.³⁶ *Daccach* conceded that the rule allows a court to consider certifying an issues class, but rejected “the further step of excepting a final judgment in such a class action from the principles of res judicata.”³⁷

Particularly interesting about the *Daccach* decision was its application of the *Zachery* inadequate representation rationale to a (b)(3) class action in which there is a right to opt out.³⁸ *Zachery* had stressed the absence of an opt-out right in a (b)(2) class action, apparently because the class members would be saddled with the class representative’s decision only to assert certain claims without an opportunity to withdraw from the suit.³⁹ The class members in *Daccach*, however, would be given notice of what claims were asserted and could have decided that the omitted claims were of such value that they would

tion.” *Daccach*, 217 S.W.3d at 454–55. *Allison* did say that a second suit for *disparate impact* would be barred, but that is because the issues would be identical and that would not necessarily mean that a second suit for *disparate treatment* to an individual class member (which would likely raise different issues) would be barred. *Allison*, 151 F.3d at 425. Arguably, *Allison* did not read *Cooper* as narrowly as did the Texas Supreme Court.

³¹ *Daccach*, 217 S.W.3d at 455.

³² *Id.* at 452.

³³ *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

³⁴ *Id.* at 745 n.21.

³⁵ *Daccach*, 217 S.W.3d at 455.

³⁶ See *infra* text accompanying notes 55–61.

³⁷ *Daccach*, 217 S.W.3d at 455.

³⁸ *Id.* at 456–57.

³⁹ *Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 244 (W.D. Tex. 1999).

opt out and file their own action.⁴⁰ If, as will be discussed, the notice were sufficient to inform the class members that other claims were available and would be at risk of loss due to preclusion, the argument that the class representative not representing class members properly by omitting some claims would be considerably weakened.

The Texas Supreme Court revisited its *Daccach* approach a year later in *Bowden v. Phillips Petroleum Co.*⁴¹ This was a (b)(3) class action by royalty owners against the natural gas producer alleging it had engaged in transactions resulting in underpaying royalties.⁴² After reversal of the trial court's first class action certification, the plaintiffs on remand alleged a single breach of contract claim, rather than including various implied or express obligations under the leases and agreements.⁴³ The court of appeals held that the certification order impermissibly split the cause of action, that the unasserted claims could be subject to preclusion, and that abandoning those claims rendered the class representatives inadequate.⁴⁴ The Texas Supreme Court stated that it disagreed with the court of appeals' holding that class representatives who split the claims are per se inadequate.⁴⁵ In a somewhat milder reiteration of *Daccach*, the court said that "[t]he choice of claims to pursue or abandon is one relevant factor in evaluating the requirements for class certification," and remanded for an assessment of the class action requirements in light of preclusive effects on abandoned claims.⁴⁶ Absent, however, was a recognition that the abandoned claims may be of no real value to a class member (for example, because they are too weak, or because an individual suit is not economically feasible and the class member is content to accept the class representative's decision to drop them) and that failure to opt out signifies unconcern about the risk of preclusion.

IV. THE FIFTH CIRCUIT FOLLOWS THE *ZACHERY* APPROACH

The Fifth Circuit has been an unfavorable forum for class action plaintiffs in recent years, applying strict standards for: (1) what constitutes "incidental" damages to qualify as a (b)(2) class action, (2) what is required for "predominance of common questions" to qualify for a (b)(3) class action, and (3) whether issues classes can avoid the pre-

⁴⁰ *Daccach*, 217 S.W.3d at 458.

⁴¹ *Bowden v. Phillips Petrol. Co.*, 247 S.W.3d 690 (Tex. 2008).

⁴² *Id.* at 694.

⁴³ *Id.* at 695–96.

⁴⁴ *Id.* at 696.

⁴⁵ *Id.*

⁴⁶ *Id.* at 698.

dominance requirement.⁴⁷ Thus, it may not be surprising that it would adopt the views of *res judicata* and adequacy of representation reflected in *Zachery* that would further limit the strategic structuring of cases to permit class treatment. *McClain v. Lufkin Industries, Inc.*,⁴⁸ was an employment discrimination class action under Title VII and § 1981.⁴⁹ The district court found that the defendant’s practice of delegating subjective decisionmaking authority to its white managers with respect to assignments and promotions resulted in a *disparate impact* of discrimination and awarded \$3.4 million in backpay as well as injunctive relief.⁵⁰ However, the court had declined to certify a (b)(2) class for *disparate treatment*, “[concluding] that the class representatives would be ‘inadequate’ if they dropped the class members’ demand for compensatory and punitive damages” in order to avoid the predominance requirement.⁵¹ With little new analysis, the Fifth Circuit’s *McClain* decision concurred with the approach in *Zachery*, saying, “if the price of a Rule 23(b)(2) disparate treatment class both limits individual opt outs and sacrifices class members’ rights to avail themselves of significant legal remedies, it is too high a price to impose.”⁵² The decision made no mention of the rule change that allows the court to order notice for a (b)(2) class certification, and arguably to permit members to opt out.⁵³

V. CONTRARY APPROACHES OF OTHER COURTS

Some courts have agreed with the emphasis in *Daccach* on the risk of preclusion from limiting claims in a class action as demonstrating inadequate representation.⁵⁴ However, other courts have dis-

⁴⁷ See *infra* text accompanying notes 75–86.

⁴⁸ *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264 (5th Cir. 2008).

⁴⁹ *Id.* at 271.

⁵⁰ *Id.* at 272.

⁵¹ *Id.* at 283.

⁵² *Id.*

⁵³ *Farmers Group, Inc. v. Geter*, No. 09-05-386 CV, 2006 WL 4674359, at *3 (Tex. App. July 26, 2007), upheld the certification of an opt-out, equitable-relief (b)(2) class of homeowner insurance policyholders who sought a declaratory judgment of their right to renew policies. The court found *Daccach* inapplicable to sustain the argument that individual claims for damages would be preempted and, therefore, representation was inadequate. *Id.* at *4.

⁵⁴ See, e.g., *Clark v. Experian Info. Solutions, Inc.*, Nos. Civ.A.8:00-1217-24, Civ.A.8:00-1218-24, Civ.A.8:00-1219-24, 2001 WL 1946329, at *4 (D.S.C. Mar. 19, 2001) (finding that the interests of class representatives cannot be aligned with those of the class if class representatives abandon potential claims); *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 550 (D. Minn. 1999) (finding inadequate representation for reserving certain claims, since Minnesota preclusion law applies not only to matters litigated but to what might have been litigated, and possible prejudice was too great to find adequate representation); *Pearl v. Allied Corp.*, 102 F.R.D. 921, 924 (E.D.

agreed, finding that splitting causes of action in appropriate situations is authorized by the class action rule and the necessities of class action management, and does not risk preclusion or make a representative inadequate. For example, the court in *In re Universal Service Fund Telephone Billing Practices Litigation*⁵⁵ rejected the defendant's argument that, by abandoning a fraud claim that would have prevented class certification due to the requirement of reliance, class counsel was not an adequate representative. Instead, the court held that the interests of both plaintiffs and absent class members were served by class certification.⁵⁶ It said that, otherwise, the "defendants could routinely defeat class certification by simply injecting the argument that a conflict of interest exists between the named plaintiffs and the absent class members because the named plaintiffs are not pursuing potential fraud claims."⁵⁷ In *Sullivan v. Chase Investment Services of Boston, Inc.*,⁵⁸ a district court found that abandoning certain claims was "the proper course" in order to accomplish class certification:

It is not uncommon for defendants to engage in a course of conduct which gives rise to a variety of claims, some amenable to class treatment, others not. Those claims that are amenable should be prosecuted as class actions in order to realize the savings of resources of courts and parties that Rule 23 is designed to facilitate. . . . Class representatives must press all claims which can be prosecuted on a class basis, but they need not and should not press for certification of claims that are unsuitable for class treatment.⁵⁹

In *Cameron v. Tomes*,⁶⁰ the First Circuit found that no preclusion resulted from not asserting all possible claims, stating that a class judgment "binds the class members as to matters actually litigated but does not resolve any claim based on individual circumstances that was not addressed in the class action."⁶¹

Pa. 1984) (finding inadequate representation because of abandoned claims, thereby exposing the class members to the preclusive effect of res judicata).

⁵⁵ *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 219 F.R.D. 661 (D. Kan. 2004).

⁵⁶ *Id.* at 669.

⁵⁷ *Id.* at 670.

⁵⁸ *Sullivan v. Chase Inv. Servs. of Boston, Inc.*, 79 F.R.D. 246 (N.D. Cal. 1978).

⁵⁹ *Id.* at 265.

⁶⁰ *Cameron v. Tomes*, 990 F.2d 14 (1st Cir. 1993).

⁶¹ *Id.* at 17.

VI. “HYBRID” AND “ISSUES” CLASS PRACTICE UNDER THE CLASS ACTION RULE

The strict rule requiring assertion of all claims in order to avoid preclusion espoused in cases like *Daccach* runs counter to the long practice of courts bifurcating cases and certifying hybrid and issues class actions. Although in jurisdictions like the Fifth Circuit and Texas, the availability of those devices so as to permit class certification has been severely undercut, they are still used in many class action cases. The position taken in *Sullivan* that “[c]lass representatives must press all claims which can be prosecuted on a class basis, but they need not and should not press for certification of claims that are unsuitable for class treatment” reflects a very different view of the responsibility of class representatives to class members.⁶² It recognizes that often class treatment is the only feasible way that class members can obtain a lawyer and gain access to the courts,⁶³ and that strategic limitation of claims can be as critical to success as the substantive issues. It also views the class action rule as authorizing judicial discretion in the shaping of a class action to make it manageable.⁶⁴ However, the permissible parameters of such practices as hybrid and issues classes are much debated, and much can depend on the particular trial or appellate court where the case is filed.

A. Hybrid Classes

Federal Rule of Civil Procedure 42 provides that “[f]or convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims,

⁶² *Sullivan*, 79 F.R.D. at 265.

⁶³ “[T]he objective of consumer class actions is not only compensation, but also deterrence and disgorgement of wrongful profits.” Edward F. Sherman, *Consumer Class Actions: Who Are the Real Winners?*, 56 ME. L. REV. 223, 228 (2004). The Reporter to the Advisory Committee that drafted the 1966 class action rule noted that class actions were intended “to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.” Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969).

Most “negative value” cases, where the expected recovery is less than the cost of litigation, would not be litigated if there were no class actions, and thus wrongdoers might never have to answer for their conduct. A small recovery is arguably not the only benefit that a class member receives. He also receives the satisfaction of knowing that the defendant will have to pay all the class members for their losses and disgorge any unlawful profits, hopefully to deter such conduct in the future. Sherman, *supra*, at 228.

⁶⁴ See Edward F. Sherman, *Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process*, 25 REV. LITIG. 691, 693–94 (2006).

crossclaims, counterclaims, or third-party claims.”⁶⁵ Called “bifurcation” (or trifurcation or polyfurcation, if separate trials are ordered for more than two claims), this authority has been especially important in courts’ dispositions of aggregate litigation.⁶⁶

The use of hybrid class actions is an application of bifurcation. This vehicle has had particular importance in employment discrimination cases in which class members seek both classwide injunctive or declaratory relief and an individual remedy in the form of backpay. Federal Rule of Civil Procedure 23(b)(2) allows a class action for injunctive or declaratory relief, while Rule 23(b)(3) provides for a class action for damages.⁶⁷ Using the hybrid approach, a court could certify a (b)(2) class action for injunctive or declaratory relief, to be followed by a (b)(3) class action for individualized awards of backpay. Since there was no opt-out right in a (b)(2) class action (although, after 2003, a court could require notice and arguably require an opt-out right⁶⁸), notice of a right to opt out would only be given after the (b)(2) trial had been held.⁶⁹

Hybrid class actions have also been resorted to in cases other than employment discrimination.⁷⁰ *Simon v. World Omni Leasing, Inc.*,⁷¹ was a class action against an auto leasing company on behalf of persons who had entered into long-term leases.⁷² It sought a declaration that the disclosure statement violated the Truth in Lending Act, an injunction against enforcement of the leases, and monetary refunds.⁷³ The district court certified the class in two stages, the first to determine liability, as to which there would be no opt-out right, and the second for monetary relief, as to which class members could opt out and pursue their own private rights of action.⁷⁴

⁶⁵ FED. R. CIV. P. 42(b).

⁶⁶ See *Simon v. Philip Morris, Inc.*, 200 F.R.D. 21, 32 (E.D.N.Y. 2001) (“Bifurcation procedure has evolved to accommodate the modern emphasis on active judicial management of complex cases, particularly in the realm of mass tort disputes.”).

⁶⁷ FED. R. CIV. P. 23(b)(2)–(3).

⁶⁸ See *supra* notes 19, 53; *infra* note 137.

⁶⁹ See *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1554–55 (11th Cir. 1986) (holding that an opt-out procedure was inappropriate before the monetary relief stage of a hybrid Rule 23(b)(2) class action).

⁷⁰ As some courts have adopted restrictive applications of the predominance, superiority, and manageability requirements that only apply to (b)(3) classes, class lawyers have sometimes tried to structure their cases as (b)(2) classes, even when they seek substantial damages.

⁷¹ *Simon v. World Omni Leasing, Inc.*, 146 F.R.D. 197 (S.D. Ala. 1992).

⁷² *Id.* at 199.

⁷³ *Id.* at 203.

⁷⁴ *Id.*

Hybrid class actions have been viewed by some courts as an improper way to avoid the requirements of both (b)(2) and (b)(3) class actions. The Fifth Circuit led the opposition, refusing in *Allison v. Citgo Petroleum Corp.*,⁷⁵ to extend (b)(2) class actions to cases in which additional money damages do not flow directly from the equitable relief and would require individualized determinations.⁷⁶ It has also taken a strict view of the “predominance of common questions,” superiority, and manageability requirements for a (b)(3) class action, rejecting class treatment of many cases.⁷⁷ Thus, employment discrimination cases in which money damages (as opposed to backpay) are sought would not be certifiable under either (b)(2) or (b)(3).⁷⁸ Under this view, certifying a hybrid class would not solve the problem because the damages portion of the case could not be certified under (b)(3) and furthermore would violate the Seventh Amendment by reexamining the first jury’s findings.

It is hard to reconcile these cases with those of other circuit and district courts that have been more permissive as to allowing damages in a (b)(2) class action,⁷⁹ as well as to the predominance question in

⁷⁵ *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402 (5th Cir. 1998).

⁷⁶ *Id.* at 415. The Advisory Committee’s Notes to Rule 23(b)(2) provide that a (b)(2) class action “does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.” FED. R. CIV. P. 23(b)(2) advisory committee’s note, *reprinted in* 39 F.R.D. 95, 102 (1966). This issue came to a head when the Civil Rights Act of 1991, 42 U.S.C. § 1981a(a)(1) (2006), accorded for the first time a right to compensatory and punitive damages in employment discrimination cases. Unlike backpay, which was considered equitable and therefore consistent with a (b)(2) class action, compensatory and punitive damages are clearly “money damages.” *Allison* held that for monetary relief to be allowed in a (b)(2) class action, it must “flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief” and must be “incidental,” that is, “capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member’s circumstances.” *Allison*, 151 F.3d at 415; *accord* *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001).

⁷⁷ *See Allison*, 151 F.3d at 419–20 (finding employment discrimination suit for injunction and damages not certifiable under (b)(3)); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) (finding class action for nicotine addiction not certifiable under (b)(3)). *Allison* also equated the predominance, superiority, and manageability requirements in (b)(3) with an inherent requirement of cohesiveness in (b)(2) classes, concluding that “the predominance requirement of Rule 23(b)(2) serves essentially the same functions as the procedural safeguards and efficiency and manageability standards mandated in (b)(3) class actions.” *Allison*, 151 F.3d at 414–15.

⁷⁸ *See Hart*, *supra* note 17, at 824–47 (questioning whether employment discrimination class actions can continue to be certified under the *Allison* approach).

⁷⁹ The Second Circuit would allow even substantial money damages in a (b)(2) class action if, on an ad hoc basis, a reasonable plaintiff would have sought injunctive or declaratory relief even if money damages were not available. *Robinson v. Metro-N. Commuter R.R. Co.*, 267 F.3d 147, 164 (2d Cir. 2001); *accord* *Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2003); *see also* *Berger*

(b)(3) classes⁸⁰ and the Reexamination Clause of the Seventh Amendment.⁸¹ Thus, a hybrid approach is still possible in a number of circuits. The Eleventh Circuit commented that a bifurcated, or hybrid, class action for injunctive relief would be appropriate so long as individualized damage awards were not at stake.⁸² Even the Fifth Circuit modified its strict *Allison* approach to (b)(2) class actions in *In re Monumental Life Insurance Co.*,⁸³ a civil rights case in which it found that damages were “incidental” where they could be determined on a classwide basis through such methods as standardized formulas or grids.⁸⁴ It found that a (b)(2) class was permissible even though applying the formulas or grids would be complicated (“the monetary predominance test does not contain a sweat-of-the-brow exception”).⁸⁵ That case, however, did not rely on a hybrid class action, but on a finding that the damages were allowable in a (b)(2) class action as only incidental.⁸⁶ The split between the circuits goes not only to impediments to hybrid class actions and bifurcation, but also to fundamental disagreement as to predominance and cohesiveness in class actions, and would seem to require Supreme Court review at some point.

B. Issues Class Actions

Rule 23(c)(4) authorizes the certification of classes “with respect to particular issues,”⁸⁷ referred to as “issues” classes. Thus, an issues

v. Xerox Ret. Income Guarantee Plan, 338 F.3d 755, 763 (7th Cir. 2003) (holding that a suit for declaratory relief regarding determination of lump-sum distributions could be certified under (b)(2)).

⁸⁰ See, e.g., *Chiang v. Veneman*, 385 F.3d 256, 266 (3d Cir. 2004) (finding a “uniform course of conduct” sufficiently subject to common proof to sustain partial (b)(3) class certification); *Klay v. Humana, Inc.*, 382 F.3d 1241, 1258–59 (11th Cir. 2004) (finding that reliance could be proven on a classwide basis to satisfy predominance).

⁸¹ See *infra* text accompanying notes 108–30.

⁸² See *Cooper v. S. Co.*, 390 F.3d 695, 721 n.14 (11th Cir. 2004). Cases certifying hybrid class actions

stand for the proposition that it may be appropriate to use a bifurcated or hybrid trial process in Rule 23(b)(2) cases when class-wide injunctive relief is appropriate, followed by individualized awards of *back pay*. Significantly, these cases do not hold that such a process is appropriate (much less required, as plaintiffs would have it) when highly individualized awards of compensatory and punitive damages are at stake.

Id.

⁸³ *In re Monumental Life Ins. Co.*, 365 F.3d 408 (5th Cir. 2004).

⁸⁴ *Id.* at 419.

⁸⁵ *Id.*

⁸⁶ *Id.* at 416.

⁸⁷ FED. R. CIV. P. 23(c)(4).

class action could be certified for issues in which common questions predominate, while other issues would be resolved outside of the class action (as when individual issues, such as individual causation, reliance, affirmative defenses, or damages, are to be decided in individual or small group trials or by resort to administrative processes).⁸⁸ A pertinent question is whether an issues class can satisfy the predominance requirement. Plaintiffs argue that individual issues can be separated off for resolution in a later phase, and thus an earlier issues phase, looked at by itself, would easily satisfy predominance. This argument was rejected in *Castano*, where the Fifth Circuit said that “a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial.”⁸⁹ Other Fifth Circuit opinions have rejected issues classes as “an attempt to ‘manufacture predominance through the nimble use of subdivision (c)(4).’”⁹⁰

Many courts, however, seem to take the view expressed by Judge Weinstein that “trial judges have the discretion to sever issues under the more particular Rule 23(c)(4)(A) in a fashion that facilitates class adjudication of common issues,”⁹¹ and thus apply the predominance requirement only to the issues phase of a phased or segmented trial.⁹² Again, there is a fundamental difference of approach as to segmentation of litigation. The advocates of phased trials view an issues class as a case management device that can properly sever off individual issues into a discrete segment for later determination, while opponents maintain that the litigation must be viewed as a whole for a predomi-

⁸⁸ See PAUL D. RHEINGOLD, *LITIGATING MASS TORT CASES* § 16.25 (2006).

[Mini-trials may be used] to try damages and other individual or local issues in a mass tort litigation after general issues, usually liability and causation, have been resolved globally. Small (“mini”) groups of cases are tried together, one group after another, as has been the practice in the asbestos cases.

Id.

⁸⁹ *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996).

⁹⁰ *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 422 (5th Cir. 1998) (quoting *Castano*, 84 F.3d at 745 n.21). Compare Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709, 757–59 (2003) (arguing that expansive issues class actions are not authorized under the current rules), with Jon Romberg, *Half a Loaf Is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 UTAH L. REV. 249, 251 (urging expanded use of issues classes).

⁹¹ *Simon v. Philip Morris, Inc.*, 200 F.R.D. 21, 32 (E.D.N.Y. 2001); see also *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177, 189 (4th Cir. 1993) (“Rule 23(c)(4) makes[s] plain that district courts may separate and certify certain issues for class treatment . . .”).

⁹² See *Cent. Wesleyan Coll.*, 6 F.3d at 185 (stating that district courts should “take full advantage” of Rule 23(c)(4) to “reduce the range of disputed issues in complex litigation” and to achieve judicial efficiencies).

nance determination and that segmenting is inconsistent with the class action rules.

Issues classes have been particularly attractive to class action attorneys as a way to keep individual questions from predominating, so as to satisfy the “predominance of common questions” requirement for a Rule 23(b)(3) class action. Asbestos cases were among the first to rely on phased trials to meet class certification requirements. Over decades, class actions had been regularly denied in cases for personal injuries from exposure to asbestos. Although there were common questions, such as the defectiveness of the product and knowledge of the risk by the manufacturers, individual questions, such as the circumstances of exposure, likelihood of other causes, and injury, were found to predominate.⁹³ In the mid-1980s, Judge Robert Parker, confronted with over 5000 asbestos cases then pending before the Fifth Circuit, certified a class action with common issues to be tried in a classwide first-phase trial.⁹⁴ Individual issues, such as causation, affirmative defenses, and injury, were left for a later phase, to be conducted as individual or mini-trials of a small number of similar cases.⁹⁵ The Fifth Circuit upheld this approach in *Jenkins v. Raymark Industries, Inc.*,⁹⁶ commenting that “courts are now being forced to rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters.”⁹⁷ There was a settlement before the later individualized phases had to be conducted.

Phased or issues trials have been adopted in a large number of class actions, as to such matters as injuries from an antinausea drug;⁹⁸ a supper club fire resulting in 164 deaths;⁹⁹ a tanker accident discharging 11 million gallons of oil into an Alaskan sound;¹⁰⁰ an explosion in

⁹³ A nationwide class of schools against three asbestos manufacturers for costs of removing asbestos from buildings was certified in *In re School Asbestos Litigation*, 789 F.2d 996, 998–99 (3d Cir. 1986). Predominance of common questions could be met since the circumstances of exposure were similar, and causation and injury were not individualized as in personal injury cases.

⁹⁴ *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 469–70 (5th Cir. 1986).

⁹⁵ *See id.* at 471.

⁹⁶ *Id.*

⁹⁷ *Id.* at 473.

⁹⁸ *In re Bendectin Prods. Liab. Litig.*, 857 F.2d 290, 319 (6th Cir. 1988) (upholding a trifurcated procedure in which the first phase trial as to generic causation resulted in a defense verdict, thus ending the immediate litigation).

⁹⁹ *In re Beverly Hills Fire Litig.*, 695 F.2d 207, 210 (6th Cir. 1982) (upholding a three-phase trial in which the first phase addressed whether the wiring could have caused the fire).

¹⁰⁰ *See generally* Elizabeth Cabraser, *Beyond Bifurcation: Multi-Phase Trial Structures in Mass Tort Class Actions*, 7 CLASS ACTIONS & DERIVATIVE SUITS 2, 5–6 (1997).

an oil refinery;¹⁰¹ property damage claims by homeowners for defective hardboard siding;¹⁰² personal injury claims by opt-outs from a breast implant settlement;¹⁰³ claims of 10,000 persons who were tortured, executed, or “disappeared” against the former dictator of the Philippines;¹⁰⁴ and claims of employees for injuries resulting from a casino ship’s defective ventilation system.¹⁰⁵ A federal judge in Louisiana certified a class action on behalf of several thousand people claiming property damage from the rupture of an oil storage tank during Hurricane Katrina.¹⁰⁶ The judge approved a three-phase trial plan, with phase one concerning common issues of liability, phase two on common issues regarding punitive damages, and phase three on compensatory damages for class members.¹⁰⁷

A critical question as to the feasibility of issues classes is the Seventh Amendment’s Reexamination Clause, which provides that “no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”¹⁰⁸ Different juries may be used for the trials of different segments that result from the certification of issues classes. Segmenting of issues and claims is limited in “recognition of the fact that inherent in the Seventh Amendment guarantee of a trial by jury is the general right of a litigant to have only one jury pass on a common issue of fact.”¹⁰⁹ The

¹⁰¹ *Watson v. Shell Oil Co.*, 979 F.2d 1014, 1018 (5th Cir. 1992) (ordering a phase-one trial of common issues regarding liability in suit growing out of refinery explosion, to be followed by three more phases).

¹⁰² *Ex parte Masonite Corp.*, 681 So. 2d 1068, 1076 (Ala. 1996). *But see In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 420–24 (E.D. La. 1997) (refusing to certify a nationwide class of purchasers of defective siding, finding the state laws on many issues varied substantially, and stating that “this Court cannot imagine managing a trial under the law of 51 jurisdictions on the defectiveness of Masonite siding”).

¹⁰³ *Spitzfaden v. Dow Corning Corp.*, 619 So. 2d 795 (La. Ct. App. 1993) (using four phases, with a first-phase trial as to defendant’s conduct, knowledge, intent, negligence, and duty). For a more detailed account, see generally Dawn M. Barrios, *The Long and Winding Road for Spitzfaden, Louisiana’s Breast Implant Class Action: Ad Astra per Aspera*, 74 TUL. L. REV. 1941 (2000).

¹⁰⁴ *Hilao v. Estate of Marcos*, 103 F.3d 767, 782 (9th Cir. 1996) (holding separate trials as to liability, exemplary damages, and compensatory damages, in which a special master used claims of 137 randomly selected cases to determine individual damage awards).

¹⁰⁵ *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 623 (5th Cir. 1999) (using a two-phase trial, with the first phase addressing the issues of negligence and the unseaworthiness of the vessel).

¹⁰⁶ *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597, 601 (E.D. La. 2006).

¹⁰⁷ *Id.* at 606.

¹⁰⁸ U.S. CONST. amend. VII.

¹⁰⁹ *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978) (footnote omitted).

test, based on *Gasoline Products Co. v. Champlin Refining Co.*,¹¹⁰ a 1931 case concerning a partial new trial on the question of damages (which it found “so interwoven with that of liability that the former cannot be submitted to the jury”), is that an issue may only be separated if “so distinct and separable from the others that a trial of it alone may be had without injustice.”¹¹¹ Although there may be some overlapping of evidence in different segments, courts have generally found that such issues as liability, damages, causation, and affirmative defenses satisfy the “distinct and separable” test, and that there is no violation of the Seventh Amendment when they are tried separately. “[The] Seventh Amendment prohibition is not against having two juries review the same evidence, but rather against having two juries decide the same essential issues.”¹¹²

Cases in two circuits have found a Seventh Amendment violation in the use of issues classes. In *In re Rhone-Poulenc Rorer, Inc.*,¹¹³ the trial court certified a class action and ordered an initial trial limited to the question of the negligence of the defendant manufacturers of blood solids for hemophiliacs that infected the plaintiffs with AIDS.¹¹⁴ The order stated that if negligence were found in the initial trial, the class members could file individual suits, which would use special verdicts and the preclusion doctrine to avoid relitigation of the issue of negligence.¹¹⁵ In finding the court exceeded its authority, Judge Richard Posner stated that issues of comparative negligence and proximate cause that would arise in the individual suits overlapped the issue of negligence and thus the court improperly allowed reexamination by different juries.¹¹⁶ The Fifth Circuit, in *Castano v. American Tobacco Co.*,¹¹⁷ adopted this analysis, rejecting a proposed classwide trial of “core liability” issues relating to the defendant tobacco companies’ conduct concerning “nicotine addiction,” which was to be followed by trials of the individual issues of class members.¹¹⁸ The Fifth Circuit

¹¹⁰ *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494 (1931).

¹¹¹ *Id.* at 500.

¹¹² *In re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444, 452 n.5 (3d Cir. 1997) (internal quotation marks and citation omitted) (holding that, because a phase-one trial found no exposure, phase two as to causation was unnecessary; even if a second trial had been conducted before a different jury, there would have been no reexamination in violation of the Seventh Amendment).

¹¹³ *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995).

¹¹⁴ *Id.* at 1296–97.

¹¹⁵ *Id.* at 1297.

¹¹⁶ *Id.* at 1303.

¹¹⁷ *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

¹¹⁸ *Id.* at 749.

panel found a risk of reexamination,¹¹⁹ since comparative fault was a central issue, given the longtime warnings on tobacco packages and general recognition of health risks in smoking.¹²⁰ It reasoned:

There is a risk that in apportioning fault, the second jury could reevaluate the defendant's fault, determine that the defendant was not at fault, and apportion 100% of the fault to the plaintiff. In such a situation, the second jury would be impermissibly reconsidering the findings of a first jury.¹²¹

Undoubtedly, issues that are not sufficiently freestanding to warrant a separate trial should not be the subject of bifurcation. But presumably a second jury would be instructed that it had to accept the first jury's findings. Judge Rovner, dissenting in *Rhone-Poulenc*, noted that the trial judge could modify severance orders, procedural decisions, and certification rulings to avoid any Seventh Amendment problems.¹²² Judge Weinstein commented in *Simon v. Philip Morris, Inc.*,¹²³ that “[t]here is some doubt about whether a second jury would be reexamining the first jury's findings of the defendant's negligence when it found the plaintiff also contributorily liable to some percentage (assuming that the first jury did not put an end to the case by finding no negligence).”¹²⁴ He also found that reexamination could be avoided in bifurcation by appropriate judicial supervision.¹²⁵

Rhone-Poulenc and *Castano* have not been followed by most courts, which have continued to use bifurcation and issues classes in appropriate class action cases, finding no Seventh Amendment problem even as to issues like comparative fault and proximate cause.¹²⁶ The American Law Institute's *Principles of the Law of Aggregate Litigation*¹²⁷ recognized “the practical difficulties that attend the aggregate treatment of liability issues when applicable substantive law does not separate cleanly issues of liability from disputed affirmative de-

¹¹⁹ *Id.* at 750.

¹²⁰ *Id.* at 751.

¹²¹ *Id.*

¹²² *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1308 (7th Cir. 1995) (Rovner, J., dissenting).

¹²³ *Simon v. Philip Morris, Inc.*, 200 F.R.D. 21 (E.D.N.Y. 2001).

¹²⁴ *Id.* at 48.

¹²⁵ *Id.* at 27.

¹²⁶ See cases cited *supra* notes 98–107.

¹²⁷ PRINCIPLES OF THE LAW OF AGGREGATE LITIG. (2010).

fenses.”¹²⁸ They urged that the relitigation question be given “a functional perspective based on the aims of aggregation”¹²⁹:

Given the tendency of evidence in many instances to be relevant to multiple aspects of a claim, it is not realistically possible to insist that no reconsideration of evidence whatsoever may occur across the aggregate proceeding and subsequent proceedings. The question is one of degree and, as such, calls for the exercise of judicial discretion, in keeping with the discretionary nature of the determination whether to authorize aggregate treatment.¹³⁰

The policies of the Reexamination Clause are obviously different from those underlying the preclusion doctrine. However, both are concerned with according finality to judgments and focus on whether the factual issues in the second trial are distinct and separate. The Reexamination Clause debate is relevant to the abandoned claims debate in demonstrating the flexibility of courts in administering class actions to avoid running afoul of the rule. Judge Weinstein’s comment that reexamination of the first jury’s fact determinations in violation of the Seventh Amendment can be avoided by appropriate judicial supervision¹³¹ has resonance in the abandoned claims debate. Through the use of bifurcation, phased trials, hybrid classes, and issues classes, a number of courts have concluded that the risk of preclusion can be minimized. Other courts have found such procedures inadequate, but one senses that the disagreement is very much related to fundamentally differing views as to the utility of class actions. A pertinent question is whether there are measures that can be taken to reduce the risk of preclusion and inadequate representation when class plaintiffs do not pursue all available claims.

VII. JUDICIAL SUPERVISION TO REDUCE THE RISK OF PRECLUSION AND INADEQUATE REPRESENTATION

Rule 23 clearly contemplates the use of multiple phases, segments, or trials as part of the management of class actions. However, such procedures cannot supplant the substantive preclusion rules, and if there is a genuine risk of preclusion of claims not pursued or abandoned, then the class members may not be adequately represented.

¹²⁸ PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.03 cmt. b, at 109 (Proposed Final Draft 2009).

¹²⁹ PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.06 cmt. a, at 131 (Preliminary Draft No. 5, 2008).

¹³⁰ PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.03 cmt. b, at 99 (Proposed Final Draft 2009).

¹³¹ *Simon v. Philip Morris, Inc.*, 200 F.R.D. 21, 48 (E.D.N.Y. 2001).

Although some courts have seen little risk of preclusion in using such procedural devices where class treatment can be made manageable, there is reason to consider whether that risk can be minimized. Neither group of courts has given much consideration to how a certifying court can reduce the risk of preclusion, or at least ensure that class members can make an informed choice as to the limitation of claims.

First, a court should make a determination as to whether the omitted claims are likely to be of importance to the class and whether the risk of preclusion is high enough to refuse certification.¹³² The practice of some plaintiffs' attorneys of shotgunning all possible claims into a complaint should not establish that none of those claims can ever be omitted or else there would be inadequate representation. Multiple causes of action can be repetitious and overlapping, and class counsel should have some leeway in structuring a class action to be the most efficient and effective vehicle to serve the interests of the class. In the cases that find that abandoning claims is inadequate representation, there are hints that courts are particularly concerned with strategic abandonment no matter how important those claims might be to some class members. Paring down a class action so that it can be certified should not in itself be considered inadequate representation. It is often in the interests of the class members to do just that, particularly where there is little likelihood, in the absence of a class action, that class members can and will pursue the claims in individual suits. In (b)(3) class actions, a certifying court is required to find that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy," which includes whether the class members are interested "in individually controlling the prosecution or defense of separate actions."¹³³ A similar determination that there is little likelihood that class members will want to sue individually on omitted claims might be required should class certification be opposed on the basis of abandoning claims.

Second, if a court is to weigh the risk of preclusion when claims are not asserted or dropped, it should consider what prophylactic measures it might take to avoid preclusion if it is persuaded that this case can be manageable as a class action through the use of segmenting devices. Although a court cannot determine the preclusive effect of its own judgments and bind other courts in the future to that ef-

¹³² See *Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 457 (Tex. 2007) ("A trial court could, however, determine that the risk of preclusion is not high enough to refuse certification. For instance, the abandoned claims may be insignificant, unlikely to succeed in any proceeding, or not valuable. Some abandoned claims may be alleged against different defendants or may not be ripe for litigation, in which case res judicata would not apply.").

¹³³ FED. R. CIV. P. 23(b)(3)(A).

fect,¹³⁴ it is entitled to take steps to limit the preclusive effects as to claims not raised. As did the trial court in *Cooper*, a court might formally refuse to try certain claims and reserve them on the record for future disposition.¹³⁵ Of course, such action should only be done with a careful explanation of the court's conclusion that this would not violate the preclusion rule against splitting the cause of action, and would be subject to reversal for abuse of discretion. But a court that carefully examines the preclusive effects and concludes that they are minimal could considerably reduce the risk.

Third, even with these precautions, it may still be necessary for a court to order that notice be given to the class members to inform them fully of the claims that are not being asserted and of the risk of preclusion. The 2003 Rule amendment to permit a court to provide for notice in (b)(2) class actions¹³⁶ is not explicit as to whether a court's authority to require notice includes authority to provide a right to opt out, although a reasonable reading would be that notice has no function without an opt-out right. It is desirable that the caselaw clearly establish the authority to allow opt-outs, and, if not, a rule change might be necessary. Of course, a court that orders notice and opt-out rights has to consider whether that could seriously undermine the effectiveness of a (b)(2) declaratory or injunctive action.¹³⁷ But if

¹³⁴ "The Court notes initially that it cannot conclusively determine the res judicata effect of a decision yet to be handed down by this Court. That decision is for the forum presented the issue if and when it arises." *Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 243 (W.D. Tex. 1999).

¹³⁵ The court in *In re Welding Fume Products Liability Litigation*, 245 F.R.D. 279 (N.D. Ohio 2007), rejected the argument that the plaintiffs in a medical monitoring class action who entered into a tolling agreement as to their individual injuries had split their cause of action: "[n]or does the existence of the Tolling Agreement suggest that the plaintiffs are engaged in impermissible claim-splitting." *Id.* at 302 n.136; see also *Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 480 (E.D. Pa. 1997) ("[T]he 'monitoring' for diseases cannot logically be deemed to preclude class members from bringing future actions for diseases which class members may subsequently suffer . . ."); *Day v. NLO*, 851 F. Supp. 869, 877 (S.D. Ohio 1994) (certifying for class treatment "property damage, emotional distress and medical monitoring" claims, while "reserv[ing] for future litigation" claims for physical injuries); *Scott v. Am. Tobacco Co.*, 725 So. 2d 10, 18–19 (La. Ct. App. 1998) ("The trial court properly reserved the right of plaintiffs and members of this defined class to assert any claims for damages they may have sustained as a result of smoking cigarettes. The class action is limited only to a claim for a medical monitoring program.").

¹³⁶ See *supra* note 19.

¹³⁷ In a case before the 2003 amendments, *Eubanks v. Billington*, 110 F.3d 87 (D.C. Cir. 1997), an employment discrimination suit, the court agreed that opting out may be authorized in a (b)(2) class action, but held that it was not required. *Id.* at 98. Two class members who were dissatisfied with the amount they would receive as backpay in a settlement of the case asserted a right to opt out and sue for larger amounts, but the district court refused. *Id.* at 88. The appellate court found no need for a right to opt out because the two class members had been treated in the same manner as all class members, and outlined a number of factors that go into such a determination. *Id.* at 96–98.

abandoned claims are made an issue as to adequacy of representation for purposes of class certification, and the court determines that there is a genuine risk of preclusion, then there are strong reasons for it to order notice and a right to opt out. This would give class members who value those claims the opportunity to opt out and pursue them individually.

CONCLUSION

There are often valid reasons that class counsel do not allege all the possible causes of action, or choose to limit the scope of the class definition, in order to improve the chances of success on the merits or the likelihood of class certification. The 1984 Supreme Court decision in *Cooper v. Federal Reserve Bank of Richmond* established that a class action for injunctive relief does not preclude subsequent individual claims for damages. It stated that there need not be a determination in a class action of every matter raised by the case on the risk of splitting the cause of action. However, since 1955, a series of federal and state court cases in Texas have chipped away at the logical foundations of *Cooper*. Those cases found that failure to raise all possible claims on behalf of the class (sometimes pejoratively referred to as “abandoned claims”) risked preclusion of those claims not asserted due to splitting the cause of action. They then concluded that this demonstrated inadequacy of counsel, which prevented class certification.

Both the Fifth Circuit and the Texas Supreme Court adopted this analysis, although this approach has not been followed by a number of other courts. The Texas approach is inconsistent with the long tradition of hybrid and issues practice in class actions, which necessarily involves segmenting of issues in the case. Segmenting of class actions and complex litigation is also reflected in phased trials, which have often been approved under the managerial discretion of a court. Some courts, notably the Fifth Circuit, have rejected this approach as not authorized by the class action rule and violating the Reexamination Clause of the Seventh Amendment. However, many courts have seen it as necessary to ensure access to the courts and the proper judicial resolution of class actions. This Essay proposes a number of steps under the rubric of judicial supervision to reduce the risk of preclusion and a finding of inadequate representation, which would lead to denying class certification when fewer than all possible claims are asserted.