
SUBCLASSING

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ABSTRACT

This Article is the first to take a hard look at Federal Rule of Civil Procedure 23(c)(4)(B), an oft-slighted part of the class action scheme that permits a court to create subclasses “when appropriate.” Despite its tautologically unhelpful text, no other court or commentator has undertaken a comprehensive analysis of this provision. The time to do so is certainly now. As class actions grow bigger, plaintiffs seek new ways to meet Rule 23’s certification requirements. Just in the last few years, plaintiffs have turned to subclassing’s sister provision, Rule 23(c)(4)(A), which has consequently received a flurry of commentary from courts and academics. The subclassing provision, which provides an alternative mechanism to Rule 23(c)(4)(A), is therefore ripe for a similar spate of commentary and conflict. This Article sets the stage for that discussion by formulating two conflicting theories of subclassing: the replacement theory, which posits that subclasses can be certified without regard to the certifiability of the global class action, and the contingency theory, which requires any subclass to be a part of a certified global class. Testing these interpretations of Rule 23(c)(4)(B) against the traditional tools of statutory interpretation—text, context, structure, drafting history, precedent, and functionality—this Article concludes that the replacement theory is the best interpretation of the subclassing provision. Nevertheless, this Article notes the arguments to the contrary and suggests that they serve as a call to the Rules Committee and the Court to clarify the meaning and scope of the subclassing provision.

INTRODUCTION

Rule 23 of the Federal Rules of Civil Procedure governs class actions in federal court. Overshadowed by the powerhouse certification provisions of Rule 23(a) and Rule 23(b)(3), is the oft-overlooked subclassing provision of Rule 23(c)(4)(B), which states: “When appropriate . . . 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.”¹ That is all the textual guidance the Federal Rules provide on the subject of subclasses, and its meaning is far from

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¹ FED. R. CIV. P. 23(c)(4)(B).

clear. How does Rule 23(c)(4) relate to the certifiability of a class? When, indeed, is it appropriate to subclass? The Rule's tautological answer is no answer at all, and the interrelationships between Rule 23(c)(4) and Rules 23(a) and (b) are unclear.

The text has remained unchanged since 1966. Despite its age, no one has given Rule 23(c)(4)(B) the treatment it deserves. A few courts have staked out different positions on the proper role of subclasses in certification decisions, but their reasoning is sparse and superficial at best.² The Supreme Court has yet to resolve the issue, though it has danced around it several times in the last few years.³ Congress, too, missed a golden opportunity to clarify the meaning of the subclassing provision when it passed the Class Action Fairness Act of 2005, but, unfortunately, that act does not deal with subclassing at all.⁴ No other scholar has taken up this subject to give Rule 23(c)(4)(B) the attention it is due.⁵ Thus, the questions regarding the proper role of subclasses in certification decisions remain unanswered.

The time to answer them has come. Class actions are becoming increasingly larger. As the classes become bigger, the stakes become higher, for the proverbial eggs are all in one basket. The question of class certification in these massive class actions becomes the critical issue, often leading to either settlement or dismissal. With the weight of the suit riding on certification, class plaintiffs are finding creative ways to argue in favor of certification. One of those ways is the use of the

² See *infra* text accompanying notes 110-129.

³ See *infra* text accompanying notes 59-109.

⁴ Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.

⁵ See Michael P. Malakoff & Erin M. Brady, *Taming the Uncommon Issues: What Role Should Subclasses Play in Rule 23(b)(3) Certification?*, 772 PRACTISING L. INST.: CONSUMER FINANCIAL SERVICES LITIGATION 329 (1998) (arguing that subclassing cannot be a substitute for global class certification, but failing to address the textual support for the contrary interpretation); Susan Bisom-Rapp, Comment, *The Use of Subclasses in Class Action Suits Under Title VII*, 9 INDUS. REL. L.J. 116 (1987) (arguing that subclasses can replace a global, uncertifiable class based on the liberal policy of using the class mechanism to vindicate individual rights, but failing to address the contrary indications of the structure of Rule 23); Note, *Certifying Classes and Subclasses in Title VII Suits*, 99 HARV. L. REV. 619 (1986) (touching upon subclass certification, but not addressing whether subclasses may be certified if a global class cannot be). The three most prominent treatises on civil procedure take a broad view of the use of subclasses to solve commonality or predominance problems that may prevent certification in a global class, though they do not offer justification for their position. See 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1778, at 546 (2d ed. 1986) (suggesting that subclassing could make the common issues in the subdivided class action predominate for the purposes of Rule 23(b)(3)); 8 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 24:24, at 145 (4th ed. 2002) ("Bifurcation or the creation of subclasses may circumvent commonality problems."); 5 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 23.23[3], at 23-76 (3d ed. 2005) ("Similarly, if common questions do not exist among members of the class as proposed, Rule 23(c)(4) permits a court to create subclasses . . . in order to satisfy the commonality requirement."). In short, no one has yet proffered the results of a comprehensive analysis of Rule 23(c)(4)(B).

“issue class” of Rule 23(c)(4)(A), which states that an action may be maintained as a class action with respect to particular issues.⁶ The propriety of certifying “issue classes” as a way of avoiding certification of the global class has arisen relatively recently, and already some commentary has developed.⁷ Although courts have addressed the issue,⁸ as of yet there is no consensus on the proper role of “issue classes.”

A different method is the use of Rule 23(c)(4)(A)’s sister provision, the subclass mechanism of Rule 23(b)(4)(B), to bypass certification of a global class that cannot meet the certification requirements. Whether this is a proper use of subclassing is an issue that has been bubbling just beneath the surface. Unlike the issue class provision, however, far fewer scholars and courts have taken a hard look at the use of the subclassing provision for purposes of certifying an otherwise uncertifiable global class.

This Article takes up that challenge. Part I provides background on the purpose and text of Rule 23, critical to understanding the certification standards and how the subclass provision fits into the class action scheme. Part II explains the trend towards large class actions, the problems they cause for certification, and the potential solution of subclasses.

Part III begins the interpretative process by identifying two conflicting theories of the proper role of subclasses: the “contingency theory,” which states that certification of subclasses is contingent on certification of the global class, and the “replacement theory,” which states that certification of subclasses can replace the global class and obviate the need for its certification.

⁶ FED. R. CIV. P. 23(c)(4)(A) (“When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues . . .”).

⁷ The commentary is not in agreement. Compare Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567 (2004) [hereinafter Hines, *Dangerous Allure*] (arguing that before an issue class may be certified, the entire class must be certifiable), and Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709 (2003) [hereinafter Hines, *End-Run*] (same), and David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 955 (1998) (agreeing that Rule 23(b)(3) overrides issue certification unless those issues do “predominate” over the individual issues in the case), with MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.17 (1995) (supporting the opposite), and NEWBERG, *supra* note 5, §§ 4:23, 4:24 (same), and 7B WRIGHT ET AL., *supra* note 5, § 1790 (same), and Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1499-506 (2005) (urging greater use of Rule 23(c)(4)(A) to certify issue classes), with Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 REV. LITIG. 79, 95-96 (1994) (same), and 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, 263 (“[C]ases that do not otherwise meet the predominance and superiority requirements of Rule 23(b)(3) can be certified as issue classes.”).

⁸ See *infra* text accompanying notes 146-167.

Part IV demonstrates that the traditional tools for interpretation suggest that the replacement theory is the proper interpretation of Rule 23(c)(4)(B). Although the drafting history of the provision is inconclusive, the commentary is inconsistent, and the few judicial pronouncements available provide only unreasoned conclusions, the text of Rule 23(c)(4)(B) supports the replacement theory, and the prevailing interpretation of its sister provision, Rule 23(c)(4)(A), provides additional support. There are certainly counterarguments—the most prominent being the structural argument that the subclassing provision resides within the manageability section rather than the certification sections—but these arguments do not, in my opinion, outgun the textual support for the replacement theory.

I. BACKGROUND

A. *The Purpose and Benefits of Class Actions*

The plaintiff class action suit is a single-action litigation of multiple claims in a representative capacity. Essentially, one or a few named parties bring suit on behalf of all similarly situated plaintiffs. The unnamed plaintiffs need not participate in the suit, though they are bound—unless they opt out—by any merits decision for or against the class.⁹

This mechanism serves at least four purposes.¹⁰ First, it promotes judicial economy by consolidating multiple but similar claims into one to litigate the common elements simultaneously.¹¹ Second, it provides a forum for redress of small claims that are too expensive to pursue individually.¹² Third, it cuts costs for both plaintiffs and defendants. For plaintiffs, the costs of pursuing the litigation are spread among all

⁹ See *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1992).

¹⁰ There are others. Class actions protect plaintiffs against a race to the courtroom against defendants with limited funds. They also prevent the defendant from picking a particularly weak individual action to litigate to get a favorable decision, which it can then use to collaterally estop subsequent individual actions.

¹¹ *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 159 (1982).

¹² *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (“Class actions permit the plaintiffs to pool claims which would be uneconomical to litigate individually.”). The Supreme Court has gone so far as to suggest that this is a core justification for class actions. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)):

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.

plaintiffs and common issues are only litigated once.¹³ For defendants, large numbers of potential lawsuits are consolidated into one proceeding, thereby eliminating duplicative litigation. Fourth, class actions prevent the inequity of separate adjudications resulting in inconsistent results by, for example, imposing conflicting standards on a single defendant.¹⁴

The principal downside is that the class action suit is a representative suit, despite the general rule that litigation be conducted by named parties only,¹⁵ which sacrifices some individual autonomy over one's own claims and risks inadequate or unfair representation.¹⁶ Indeed, class members who are not class representatives have no right to interfere in the litigation. Under certain circumstances, individual class members may be able to "opt out" of the class,¹⁷ but they cannot direct the case without becoming representatives. As Judge Posner has stated, this kind of representative suit can lead to unfairness or even abuse:

The class action is an awkward device, requiring careful judicial supervision, because the fate of the class members is to a considerable extent in the hands of a single plaintiff (or handful of plaintiffs . . .) whom the other members of the class may not know and who may not be able or willing to be an adequate fiduciary of their interests. Often the class representative has a merely nominal stake . . . , and the real plaintiff in interest is then the lawyer for the class, who may have interests that diverge from those of the class members. The lawyer for the class is not hired by the members of the class and his fee will be determined by the court rather than by contract with paying clients. The cases have remarked the danger that the lawyer will sell out the class in exchange for the defendant's tacit agreement not to challenge the lawyer's fee request. . . . Rule 23 tries to minimize the potential abuses of the class action device in two principal ways, first by insisting that the class be reasonably homogeneous, . . . and second by insisting that the class representative be shown to be an adequate representative of the class.¹⁸

¹³ U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 402-03 (1980).

¹⁴ *Id.*

¹⁵ *Falcon*, 457 U.S. at 155.

¹⁶ *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940).

¹⁷ See FED. R. CIV. P. 23(c)(2)(B) (stating that "the court will exclude from the class any member who requests exclusion").

¹⁸ *Culver v. City of Milwaukee*, 277 F.3d 908, 910 (7th Cir. 2002) (Posner, J.); accord *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 832 n.9 (3d Cir. 1973) ("Experience teaches that it is counsel for the class representative and not the named parties, who direct and manage these actions. Every experienced federal judge knows that any statements to the contrary is [sic] sheer sophistry.").

Another downside is that class actions create their own inefficiencies that can counteract the efficiencies of consolidation that the class mechanism normally encourages. For example, the larger the class scope, the higher the stakes for class certification. Thus, the certification decision in massive class actions is often the most contentious phase of the litigation. For such expansive classes, certification is more difficult as well because wider differences among a broad group tend to minimize the commonality uniting the members, a prerequisite to certification. As a result, more time and money may be spent on the procedural hurdle of certification than on the merits. In addition, simple management of the due process concerns of the class, such as notification, present their own difficulties. In a products liability class involving millions of purchasers, for example, identification of potential class members alone may be a near impossible feat, and the mailing costs of notices may be cost-prohibitive.¹⁹ The end result of this downside is excessive delay of relief for individual class members²⁰ and unnecessarily high transaction costs associated with managing the class and litigation. These downsides cut against the salutary benefits of the class mechanism.

B. *Structure of Rule 23*

The structure of Rule 23 reflects the drafters' intent to maximize the salutary benefits of the class mechanism while minimizing its detractions. The crux of Rule 23 is to ensure that "maintenance of a class action is economical and the named plaintiffs' claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence."²¹

Rule 23(a), entitled "Prerequisites to a Class Action," states that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of [the others] only if" the four prerequisites of numerosity, commonality, typicality, and adequacy are met.²²

Numerosity is met when the class is "so numerous that joinder of all members is impractical."²³ This prerequisite demonstrates the drafters' recognition that, when practical, the joinder of the plaintiffs is

¹⁹ See *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 747 (5th Cir. 1996) (identifying the cost of providing "notice to millions of class members" as contributing to the "extensive manageability problems" of class certification).

²⁰ See David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons From a Special Master*, 69 B.U. L. REV. 695, 710 (1989).

²¹ *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

²² FED. R. CIV. P. 23(a).

²³ *Id.* at R. 23(a)(1).

preferable to class actions because each joined claimant has separate counsel and independent control over his own claims. The numerosity requirement sets a baseline criterion below which representative suits are not justified in light of the alternatives.

Commonality is met when “there are questions of law or fact common to the class.”²⁴ This prerequisite ensures that at least some minimal level of commonality unites the class so that a class-wide determination on the common issues can fairly resolve those issues for each class member. Without at least one common issue, class resolution is simply too cumbersome to be productive.

Typicality is met when “the claims or defenses of the representative parties are typical of the claims or defenses of the class.”²⁵ This prerequisite ensures that the claims of the named representatives are sufficiently similar to the claims of the other class members to justify possible representation of class claims by proxy.

Similarly, adequacy is met when “the representative parties will fairly and adequately protect the interests of the class.”²⁶ This prerequisite is broader than typicality and focuses not only on whether the interests of the named representatives and the other class members are aligned, but also on the quality of the named representatives. If a named representative is inadequate to represent the class, because, for example, he has some conflict of interest or incapacitation, he is not an adequate representative even if his claims are typical of the class claims.

If these baseline “prerequisites” of Rule 23(a) are met, then the action may have sufficient benefits and minimal detractions to qualify for class action treatment. That Rule 23(a) is satisfied, however, does not mean that the class should be certified as a class action.²⁷ Rule 23(a) only sets the baseline qualifications. Rule 23 imposes additional conditions for the class to be “maintained” as a class action to ensure that the class action is the best method for resolving the disputes.²⁸

Under the first condition, Rule 23(b)(1), a class may be certified if the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications establishing incompatible standards of conduct for the party opposing the class or (B) adjudications which would be dispositive of the interests of other members not parties to the adjudications.²⁹ Rule 23(b)(1)

²⁴ *Id.* at R. 23(a)(2).

²⁵ *Id.* at R. 23(a)(3).

²⁶ *Id.* at R. 23(a)(4).

²⁷ *Id.* at R. 23(a), advisory committee’s notes to 1966 amendments (stating that Rule 23(a)’s prerequisites are “necessary but not sufficient conditions for a class action”).

²⁸ *Id.* at R. 23(b).

²⁹ *Id.* at R. 23(b)(1); *see also id.* at R. 23(b)(1), advisory committee’s notes to 1966 amendment.

describes one of the “natural” class actions: when individual actions would create incompatible standards for the defendant to follow or would threaten the ability of the plaintiffs to protect their own interests.³⁰ In these instances, a class action is a necessary joinder device to prevent the injustices that would result from separate litigation.³¹

Under the second condition, a Rule 23(b)(2) class may be certified if “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.”³² This section is most useful—and most used—in the civil rights field, in which the defendant’s conduct affects classes of people in the same way.³³ Although the class mechanism is not as necessary in this context as it is in the Rule 23(b)(1) context, it logically lends itself to Rule 23(b)(2) classes, particularly discrimination classes, for, as the Supreme Court has stated, discrimination is, by definition, class-based.³⁴

The last condition, Rule 23(b)(3), is a catchall, discretionary aggregation device for cases that do not inherently lend themselves to class treatment but nevertheless may be adjudicated on a class basis if efficiency is furthered and adequate representation is secured.³⁵ Rule 23(b)(3) allows for certification when “the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”³⁶ Matters “pertinent” to the Rule 23(b)(3) “predominance” and “superiority” determination include (A) the members’ interest in individually controlling their own actions; (B) the extent and nature of any litigation concerning the controversy already

³⁰ See Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 388 (1967); see also FED. R. CIV. P. 23(b)(1), advisory committee’s notes to 1966 amendment (“The difficulties which would be likely to arise if resort were had to separate actions . . . here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device.”).

³¹ See Hines, *Dangerous Allure*, *supra* note 7, at 590.

³² FED. R. CIV. P. 23(b)(2).

³³ See Kaplan, *supra* note 30, at 389; see also FED. R. CIV. P. 23(b)(2), advisory committee’s notes to 1966 amendment (stating this provision includes “various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class”).

³⁴ See *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 (1982).

³⁵ See FED. R. CIV. P. 23(b)(3), advisory committee’s notes to 1966 amendment (stating that Rule 23(b)(3) “encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results”); Kaplan, *supra* note 30, at 389-90.

³⁶ FED. R. CIV. P. 23(b)(3).

commenced by or against the members; (C) the desirability of concentrating the litigation in the particular forum; and (D) the difficulties of management.³⁷

The predominance determination “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.”³⁸ The predominance factor is akin to a “supercommonality” requirement: it is met when significant legal issues are common to each class member’s cause of action or to the defense of such claims.³⁹ Predominance has both *quantitative* components (how *many* questions are common to the class) and *qualitative* components (are the common questions the major questions at issue). Implicit in predominance is the notion that the more commonality, the more economical and efficient the class action⁴⁰ and the more likely that the class has sufficient cohesion to justify representative litigation.⁴¹

“That common questions predominate,” however, “is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater practical advantages.”⁴² The superiority requirement operates as an open-ended test to determine if the class mechanism is the superior factor, when compared to available alternatives. Alternatives include test or model actions and consolidation.⁴³ One common application of the superiority analysis is in negative value claims, which are too low-value for most claimants to litigate separately given the costs of litigation but which are viable in the class mechanism, which spreads and economizes the costs.⁴⁴ It also takes on some predominance character, for if too many individualized issues exist, the class mechanism is not likely to be particularly efficient or manageable.⁴⁵

Essentially, Rule 23(b)(3) is a heightened Rule 23(a) standard. Together, they ensure both that the baseline prerequisites for certification are met and that additional levels of protection for the

³⁷ *Id.* at R. 23(b)(3).

³⁸ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

³⁹ *Id.* (explaining that predominance “trains on the legal or factual questions that qualify each class member’s case as a genuine controversy”); *see also Romberg*, *supra* note 7, at 287-88.

⁴⁰ *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001); FED. R. CIV. P. 23(b)(3), advisory committee’s notes to 1966 amendments (“It is only where this predominance exists that economies can be achieved by means of the class-action device.”).

⁴¹ *Amchem*, 521 U.S. at 623.

⁴² FED. R. CIV. P. 23(b)(3), advisory committee’s notes to 1966 amendment.

⁴³ *Id.*

⁴⁴ *In re Teletronics Pacing Sys., Inc.*, 172 F.R.D. 271, 287 (S.D. Ohio 1997); Kaplan, *supra* note 30, at 391. Representative litigation of negative value claims is also less likely to implicate due process concerns because individual class members are more likely to consent to such litigation rather than pursue it themselves. *See* William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 394 (2001).

⁴⁵ *See* Kaplan, *supra* note 30, at 393.

parties and levels of efficiency and economy actually justify class treatment.

II. THE IMPORTANCE OF CERTIFICATION

In many cases, class actions are a plaintiff's weapon. Class certification can aggregate weak claims with strong ones and mask the weak claims in a numbers game.⁴⁶ Certification also presents the risk of an all-or-nothing verdict, which defendants are likely to avoid by settling quickly.⁴⁷ Coupled with courts' early predisposition for class certification as a way to vindicate individual rights,⁴⁸ the class mechanism has become a formidable weapon for plaintiffs.

These natural litigation pressures have caused class actions to increase in size.⁴⁹ As long as a class action will be maintained, it is in both parties' interests, generally speaking, to pack as many claimants into the class as possible. For defendants, such a scope means resolving all of the potential individual claims at once, although defendants may attempt to narrow the class to exclude those members whose claims are unlikely to succeed individually. For plaintiffs, a larger class means

⁴⁶ See *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("Class certification magnifies and strengthens the number of unmeritorious claims.").

⁴⁷ See *id.* ("The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low."); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298-300 (7th Cir. 1995); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 958 (1995). For this reason, some have denigrated certain class certifications as judicial blackmail. See *Castano*, 84 F.3d at 746; *In re GM Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85 (3d Cir. 1995) ("Another problem is that class actions create the opportunity for a kind of legalized blackmail: a greedy and unscrupulous plaintiff might use the *threat* of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims' actual worth."); *Rhone-Poulenc*, 51 F.3d at 1299-300; HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 120 (1973). Other courts have recognized that the "[m]ere pressure to settle is not a sufficient reason for a court to avoid certifying an otherwise meritorious class action suit." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1275 (11th Cir. 2004); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 145 (2d Cir. 2001) ("The effect of certification on parties' leverage in settlement negotiations is a fact of life for class action litigants. While the sheer size of the class in this case may enhance this effect, this alone cannot defeat an otherwise proper certification.").

⁴⁸ Hines, *Dangerous Allure*, *supra* note 7, at 576 (stating that "courts soon after the Rule 23 amendment began resorting to the class action rule to help manage the growing number of mass tort cases"); Hines, *End-Run*, *supra* note 7, at 709; 7A WRIGHT ET AL., *supra* note 5, § 1754, at 56-58. Particularly in the civil rights arena, courts were quick to use class actions as a vehicle for enhancing substantive rights, until the Supreme Court reminded the courts that Rule 23 was there for a reason. See *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147 (1982).

⁴⁹ In recent years, some of the largest classes for their respective claims have been certified. See, e.g., *Klay v. Humana*, 382 F.3d 1241 (11th Cir. 2004) (certifying a class of over 600,000 physicians in one of the largest commercial non-securities litigations); *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 189 (N.D. Cal. 2004) (certifying a class of over 1.6 million Wal-Mart employees in the largest ever employment discrimination class action).

less pro rata cost to each individual, a higher award upon a successful judgment (a driving incentive for counsel), and increased pressure on the defendant to settle. Even the court has an interest: it must either certify a massive class or face an unmanageable inundation of individual cases asserting the same general claims.⁵⁰

As bigger and bigger classes are crammed into the Rule 23 model, the class requirements become more and more difficult to meet. Representatives' claims are less likely to be typical of other class members' claims. Representatives are also less likely to be able to adequately represent so many different class members. For Rule 23(b)(2) classes, a defendant's conduct is less likely to have affected a broad class in the same way that it has a narrow class.

Rule 23(b)(3) classes, particularly mass torts, have the most difficulty with broad class actions because the influx of disparate individual issues erodes the predominance of common issues and affects the manageability of the class mechanism as the superior method for resolution.⁵¹ For example, in *Amchem Products, Inc. v. Windsor*, a products liability case against asbestos companies brought by plaintiffs with a broad array of claims and individual issues,⁵² the Supreme Court held that the proposed common factor, "the health consequences of asbestos," could not meet the predominance requirement.⁵³ Similarly, many courts have refused to certify Rule 23(b)(3) classes when their size became too unwieldy or unmanageable to conduct as a single action.⁵⁴

⁵⁰ See Hines, *Dangerous Allure*, *supra* note 7, at 570:

The mass tort dilemma in part results from that specter alone, the sheer number of potential mass tort claimants who might file lawsuits. Often courts are importuned to certify a class action, for example, in order to forestall an otherwise inevitable and unmanageable inundation of cases asserting injury as a result of an alleged mass tort.

⁵¹ See *id.* at 577-81. Securities fraud and antitrust cases are notable exceptions. Because of the uniformity of harm and legal issues, these cases generally fit easier into the class model than other Rule 23(b)(3) cases, despite their large class membership. See *id.* at 570 n.22; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) ("Predominance is a test readily met in certain cases . . . alleging . . . securities fraud.").

⁵² *Amchem*, 521 U.S. at 624:

Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.

⁵³ *Id.*

⁵⁴ See Hines, *Dangerous Allure*, *supra* note 7, at 580-81.

III. ENTER SUBCLASSES

A. *The Theories of Subclassing at Certification*

With so much riding on class certification, and with the increased size of classes limiting plaintiffs' certification prospects, plaintiffs (and courts) have turned to Rule 23(c) as a way to save otherwise uncertifiable class actions.⁵⁵ Subsection (c)(4)(B) states: "When appropriate . . . 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."⁵⁶ Plaintiffs confronted with a broad class that may not survive the certification decision may present subclasses as a viable option for maintaining the scope of the global class in smaller, multiple chunks, even though the global class cannot be certified.⁵⁷

This result could be justified by what I call the "replacement theory" of subclasses. Under this theory, if a global class cannot meet the certification requirements, the class can be subclassed and each subclass treated as one of multiple classes that each are then independently tested under Rule 23. The global class never goes through the certification ringer (perhaps because certification would not be possible with or without subclasses), but is, instead, simply replaced by multiple subclasses.

A contrary theory, what I call the "contingency theory," counters that there can be no "subclass" without a global class. In other words, the availability of subclasses is contingent on the certifiability of the global class. For example, if no common issue united a putative class, that class would fail Rule 23(a)(2)'s commonality requirement and be uncertifiable, even if proposed subclasses group common issues together. Although each subclass might independently satisfy Rule 23's requirements, the global class still would fail the commonality test, and therefore neither the global class nor the subclasses would be entitled to certification.

One role of subclassing consistent with both theories is that subclassing could *help* the global class meet the certification requirements. In other words, a global class that by itself would fail the adequacy of representation requirement of Rule 23(a)(4) because of divergent interests among class members may be able to meet that requirement through subclassing. By isolating divergent interests in separate subclasses with separate representatives, the subclasses resolve

⁵⁵ See, e.g., *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177, 190 (4th Cir. 1993).

⁵⁶ FED. R. CIV. P. 23(c)(4)(B).

⁵⁷ See, e.g., text accompanying notes 110-118.

the global class's adequacy problems, and then *both* can be certified under Rule 23.

I assume in this Article that this latter role of subclassing is proper.⁵⁸ It does not, however, affect the critical distinction between the replacement theory and contingency theory: whether a global class that cannot meet Rule 23's requirements *even with subclasses* can be replaced by certified subclasses. That question remains unresolved, as I demonstrate next.

B. *Supreme Court*

In three cases, the Supreme Court has had—but has not taken—the opportunity to address the conflict between the two theories of subclassing. I will describe each separately.

1. *Geraghty*

In the first, *United States Parole Commission v. Geraghty*,⁵⁹ a prisoner brought a class action challenging parole procedures on behalf of himself and other prisoners eligible for parole.⁶⁰ The district court denied certification on the ground that individual issues existed and because typicality was lacking.⁶¹ The court also simultaneously granted summary judgment for the defendant.⁶² Geraghty appealed both issues,

⁵⁸ The leading treatises agree that subclasses may be used for this purpose. See 7A WRIGHT, *supra* note 5, § 1790, at 585 (“Subdivision (c)(4) is particularly helpful in enabling courts to restructure complex cases to meet the other requirements for maintaining a class action.”); *id.* § 1790, at 268-69 (stating, as an example, that subclassing could help certify a class under the manageability requirement of Rule 23(b)(3)); 7A *id.* § 1764, at 312-13 (“Finally, in considering a question under Rule 23(a)(3), the court should keep in mind that it has the authority under Rule 23(c)(1) and Rule 23(c)(4) to shape the contours of the action by allowing class treatment for only some of the issues or by dividing the original class into subclasses.”); *id.* § 1779, at 151 (suggesting that Rule 23(c)(4) can be utilized to maintain the superiority of the class mechanism for an otherwise unmanageable class); *id.* § 1780, at 175 (suggesting that the manageability determination of Rule 23(b)(3) could be influenced by subclasses); *id.* § 1765, at 313-25 (suggesting that a court can cure adequacy problems with subclasses at the certification stage); 5 MOORE, *supra* note 5, § 23.24[7], at 23-99 (stating that if typicality is not met, “the court has broad authority to . . . divide the class into subclasses . . . so that the representative parties satisfy the typicality requirement”); *id.* § 23.25[6], at 23-147-48 (“If events occurring after class certification render a class representative inadequate, a court may remedy the problem by . . . certifying subclasses . . .”).

⁵⁹ 445 U.S. 388 (1980).

⁶⁰ *Id.* at 393.

⁶¹ *Geraghty v. U.S. Parole Comm'n*, 429 F. Supp. 737, 740-41 (M.D. Pa. 1977).

⁶² *Id.*

but before he could file a brief in the Third Circuit, he was released from prison and, therefore, no longer eligible for parole himself.⁶³

On appeal, the Third Circuit held that Geraghty's release did not moot the litigation or the appeal, vacated the grant of summary judgment, and held that the district court erred in failing to consider whether subclasses could have alleviated the district court's concerns.⁶⁴ The Third Circuit agreed with the district court that some issues were uncommon but concluded that "the district court need not have refused class certification in toto because certain claims were inapplicable to the entire class."⁶⁵ The Third Circuit chastised the district court for failing to consider "the powers and duties of the trial court under section (c)(4)."⁶⁶ Under that section, "the trial judge has the power to certify certain issues as subject to class adjudication, and to limit overbroad classes by the use of sub-classes."⁶⁷ In short, the Third Circuit held that the district court could have used subclasses to alleviate intra-class incompatibilities.⁶⁸ Accordingly, the Third Circuit remanded for consideration of subclasses.⁶⁹

The Supreme Court substantially affirmed the Third Circuit. The Court first affirmed the Court of Appeals' holding that the case was not moot.⁷⁰ Turning to the subclass question, the Court held that the district court had no obligation to consider subclasses *sua sponte*.⁷¹ However, the Court affirmed the remand order for consideration of subclasses as "a proper disposition."⁷² The remand to consider subclassing was appropriate, the Court reasoned, because the district court had denied certification and dismissed the case on the merits at the same time; there was therefore no reason for any party or the court to consider subclasses.⁷³ The remand would allow the plaintiff, now that the adverse merits decision had been vacated, to seek subclasses.⁷⁴

⁶³ *Geraghty*, 445 U.S. at 394.

⁶⁴ *Id.* at 395.

⁶⁵ *Geraghty v. U.S. Parole Comm'n*, 579 F.2d 238, 252-53 (3d Cir. 1978).

⁶⁶ *Id.* at 253.

⁶⁷ *Id.*

⁶⁸ *Id.* at 253-54.

⁶⁹ *Id.* at 254.

⁷⁰ *Geraghty*, 445 U.S. at 395-407.

⁷¹ *Id.* at 408 ("The court has no *sua sponte* obligation so to act.").

⁷² *Id.*

⁷³ *Id.*:

Respondent had no real opportunity to request certification of subclasses after the class he proposed was rejected. The District Court denied class certification at the same time it rendered its adverse decision on the merits. Requesting subclass certification at that time would have been a futile act. The District Court was not about to invest effort in deciding the subclass question after it had ruled that no relief on the merits was available.

⁷⁴ *Id.* ("The remand merely gives respondent the opportunity to perform his function [of seeking subclasses] in the adversary system.").

Neither the contingency theory nor the replacement theory is inconsistent with *Geraghty*. None of the courts determined that the global class was uncertifiable even with subclasses. Indeed, on remand, the district court certified a single class without subclasses.⁷⁵ In addition, the Supreme Court was far more concerned with the mootness issue and whether the district court had an independent obligation to consider subclasses *sua sponte*. It is likely that the propriety of subclasses in the first instance received relatively short shrift by the Justices. Thus, *Geraghty* says nothing about the propriety of certifying a global class that fails to meet Rule 23 even with the help of subclasses.

2. *Amchem*

In the second case, *Amchem Products, Inc. v. Windsor*,⁷⁶ the Court considered the legitimacy under Rule 23 of a class action certified for the purpose of achieving a global settlement of asbestos-related claims.⁷⁷ The putative class included both asbestos victims (or their families) who had filed asbestos-related lawsuits and those who had not; the class also asserted a variety of state-law claims for relief.⁷⁸ Objectors challenged the settlement based on adequacy grounds under Rule 23(a)(4), but the district court certified the 23(b)(3) class essentially by finding that the proposed settlement was fair and adequate under Rule 23(e).⁷⁹ The district court deemed subclasses unnecessary because they would entail additional cost and delay.⁸⁰

The Supreme Court reversed because the class failed to meet the requirements of Rule 23.⁸¹ The Court began, however, by noting: “Settlement is relevant to a class certification.”⁸² One way in which settlement matters, explained the Court, is that class requirements relevant to trial manageability are not mandated.⁸³ However, the Court continued, class requirements designed to ensure adequacy of representation “demand undiluted, even heightened, attention in the settlement context.”⁸⁴ The Court reasoned that Rule 23(e), which at that

⁷⁵ *Geraghty v. U.S. Parole Comm’n*, 552 F. Supp. 276, 278 (M.D. Pa. 1982), *aff’d*, 719 F.2d 1199 (3d Cir. 1983).

⁷⁶ 521 U.S. 591 (1997).

⁷⁷ *Id.* at 597.

⁷⁸ *Id.* at 602-03.

⁷⁹ *Id.* at 597, 605-08.

⁸⁰ *Id.* at 608.

⁸¹ *Id.*

⁸² *Id.* at 619.

⁸³ *Id.* at 620.

⁸⁴ *Id.*

time permitted the settlement of a class if notice is given to all class members,⁸⁵ “was designed to function as an additional requirement, not a superseding direction, for the ‘class action’ to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b).”⁸⁶ The Court reasoned that if certification of a settlement class hinged solely on the fairness of the settlement, without regard to the requirements of Rule 23(a) and (b), “both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, . . . and the court would face a bargain proffered for its approval without benefit of adversarial investigation.”⁸⁷ In addition, Rule 23 contains no authorization for courts “to substitute for Rule 23’s certification criteria a standard never adopted—that if a settlement is ‘fair,’ then certification is proper.”⁸⁸ Applying this strict Rule 23 standard, the Court held that the class failed to meet both the Rule 23(b)(3) predominance requirement⁸⁹ and the Rule 23(a)(4) “adequacy” requirement.⁹⁰

In the course of its reasoning, the Court discussed subclasses in several contexts. In discussing the adequacy of representation deficiency, the Court several times alluded to the lack of subclasses,⁹¹ suggesting that, in the Court’s view, Rule 23(c)(4)(B) could have helped the class overcome its divergences to satisfy Rule 23(a)(4).⁹² This commentary supports the theory that subclasses can be used to help an otherwise uncertifiable class meet the requirements of Rule 23. However, it does not confront the critical question dividing the contingency and replacement theories: whether subclasses could have

⁸⁵ FED. R. CIV. P. 23(e) (1997) (amended 1988 & 2003) (“A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.”). Rule 23(e) has been amended twice since 1997 and no longer contains such a reference to a “class action,” though it does retain the requirements of court approval and notice prior to settlement of a certified class. *Id.* at R. 23(e)(1) (2005).

⁸⁶ *Amchem*, 521 U.S. at 621.

⁸⁷ *Id.*

⁸⁸ *Id.* at 622.

⁸⁹ *Id.* at 622-23.

⁹⁰ *Id.* at 625.

⁹¹ *Id.* at 626 (stating that “named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses”); *id.* at 627 (“Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency.”); *id.* (“[W]here differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups.”) (quoting *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 742-43 (2d Cir. 1992)).

⁹² *Id.* at 626-27. The dissent appeared to agree. *Id.* at 636 (Breyer, J., dissenting) (“These differences might warrant subclasses, though subclasses can have problems of their own.”).

permitted certification even if the global class still could not satisfy Rule 23's requirements. Thus, *Amchem* does not resolve the issue.

3. *Ortiz*

In the third case, *Ortiz v. Fibreboard Corp.*,⁹³ the Court considered the conditions for certifying a mandatory settlement class on a limited fund theory under Rule 23(b)(1)(B).⁹⁴ The Court held that plaintiffs must show that the fund is limited by factors other than settlement and that the allocation of settlement funds has addressed any internal class conflicts.⁹⁵

The class comprised persons adversely affected by asbestos in one of three ways: all persons with personal injury claims against Fibreboard for asbestos exposure who had not yet brought suit or settled their claims, those who had dismissed such claims but retained the right to bring future actions against Fibreboard, and past, present, and future relatives of exposed persons.⁹⁶ The class excluded claimants with actions presently pending against Fibreboard or claimants whose only retained right to sue Fibreboard was upon development of an asbestos-related malignancy.⁹⁷ The class argued that certification for settlement purposes was necessary to ensure that sufficient insurance funds were available to compensate the class members.⁹⁸

The district court certified the class under Rules 23(a) and 23(b)(1)(B) and approved the settlement as fair under Rule 23(e), and the Fifth Circuit affirmed.⁹⁹ Both courts found commonality satisfied by the class members' shared interest in securing and equitably distributing maximum settlement funds and typicality satisfied by the class representatives' same shared interest.¹⁰⁰

The Supreme Court reversed, stating that "the Fifth Circuit fell short in its attention to *Amchem's* explanation of the governing legal standards."¹⁰¹ The Court reiterated *Amchem's* teaching that "a fairness hearing under Rule 23(e) is no substitute for rigorous adherence to those

⁹³ 527 U.S. 815 (1999).

⁹⁴ *Id.* at 821 ("This case turns on the conditions for certifying a mandatory settlement class on a limited fund theory under Federal Rule of Civil Procedure 23(b)(1)(B).").

⁹⁵ *Id.* ("We hold that applicants for contested certification on this rationale must show that the fund is limited by more than the agreement of the parties, and has been allocated to claimants belonging within the class by a process addressing any conflicting interests of class members.").

⁹⁶ *Id.* at 825-26.

⁹⁷ *Id.* at 826.

⁹⁸ *Id.* at 827.

⁹⁹ *Id.* at 827-30.

¹⁰⁰ *Id.* at 829.

¹⁰¹ *Id.* at 831.

provisions of the Rule ‘designed to protect absentees.’”¹⁰² The Court concluded that a fund cannot become limited and certifiable under Rule 23(b)(1)(B) merely because of the limitations imposed by the agreement of the parties; rather, the parties must present independent evidence of the limits and insufficiencies of the fund, evidence which other parties are entitled to challenge.¹⁰³

By analogizing to Rule 23(a)(4)’s adequacy requirement,¹⁰⁴ the Court reasoned that providing objecting class members and other parties meaningful opportunity to challenge the settlement and its allocation requires fair representation of the opposition groups.¹⁰⁵ The Court noted that the class failed to include several types of claimants, and that, to be maintained as a limited fund under Rule 23(b)(1)(B), the district court should have provided the structural protections of Rule 23(c)(4) subclasses to maintain equity to all types of claimants.¹⁰⁶

In addition, even those within the class itself were not adequately represented by the global class. The Court stated that

it is obvious after *Amchem* that a class divided between holders of present and future claims (some of the latter involving no physical injury and to claimants not yet born) requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel No such procedure was employed here, and the conflict was as contrary to the equitable obligation entailed by the limited fund rationale as it was to the requirements of structural protection applicable to all class actions under Rule 23(a)(4).¹⁰⁷

In other words, the district court erroneously focused on the settlement in determining that commonality and typicality were satisfied and failed to resolve “potentially conflicting interests of easily identifiable categories of claimants . . . by provisional certification of subclasses under Rule 23(c)(4), relying instead on its post hoc findings at the fairness hearing that these subclasses in fact had been adequately represented.”¹⁰⁸

The Court concluded:

¹⁰² *Id.* at 849 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)).

¹⁰³ *Id.* at 849-53.

¹⁰⁴ *Id.* at 856 n.31 (“This adequacy of representation concern parallels the enquiry required at the threshold under Rule 23(a)(4), but as we indicated in *Amchem*, the same concerns that drive the threshold findings under Rule 23(a) may also influence the propriety of the certification decision under the subdivisions of Rule 23(b).”) (citing *Amchem*, 521 U.S. at 623 n.18).

¹⁰⁵ *Id.* at 854 (“There are two issues, the inclusiveness of the class and the fairness of distributions to those within it.”).

¹⁰⁶ *Id.* at 855 (“Finally, as discussed below, even ostensible parity between settling nonclass plaintiffs and class members would be insufficient to overcome the failure to provide the structural protection of independent representation as for subclasses with conflicting interests.”).

¹⁰⁷ *Id.* at 856-57.

¹⁰⁸ *Id.* at 831-32.

Assuming *arguendo* that a mandatory, limited fund rationale could under some circumstances be applied to a settlement class of tort claimants, it would be essential that the fund be shown to be limited independently of the agreement of the parties to the action, and equally essential under Rule 23(a) and (b)(1)(B) that the class include all those with claims unsatisfied at the time of the settlement negotiations, with intraclass conflicts addressed by recognizing independently represented subclasses. . . . Those separate settlements, together with other exclusions from the claimant class, precluded adequate structural protection by subclass treatment, which was not even afforded to the conflicting elements within the class as certified.¹⁰⁹

Ortiz thus contains several allusions to subclasses and their role. It states that subclasses may be necessary to maintain structural protections of equity in limited fund cases. In other words, subclasses may be necessary to the Rule 23(b)(1)(B) limited fund determination and the Rule 23(a)(4) adequacy determination. However, like *Amchem* and *Geraghty*, *Ortiz* does not directly address the conflict between the replacement theory and the contingency theory of subclasses. *Ortiz* stands only for the principle that subclasses may be necessary to certify a global class. *Ortiz* did not address the question of whether subclasses may be independently certified if the global class is not.

C. Lower Court Conflicts

Neither theory has been uniformly adopted in the lower courts. Some courts have assumed, without directly deciding, that the replacement theory is the correct interpretation of Rule 23. For example, in *In re Telectronics Pacing Systems, Inc.*,¹¹⁰ a district court confronted a nationwide products liability action against a pacemaker company.¹¹¹ Although the district court recognized that states' products liability laws differ,¹¹² it nevertheless accepted the plaintiffs' subclass proposal to divide the class among states with similar legal standards. The plaintiffs proposed two negligence subclasses, four strict liability subclasses, and three punitive damages subclasses.¹¹³ The court proceeded to evaluate—and certify—each individual subclass separately¹¹⁴ and even sua sponte created two additional subclasses.¹¹⁵

¹⁰⁹ *Id.* at 864-65.

¹¹⁰ 172 F.R.D. 271 (S.D. Ohio 1997).

¹¹¹ *Id.* at 276, 278.

¹¹² *Id.* at 278.

¹¹³ *Id.* at 278-79.

¹¹⁴ *Id.* at 279-95.

However, the court did not systematically evaluate the global class for compliance with Rule 23, most likely because the legal variations made the global class uncertifiable under Rule 23(b)(3)'s predominance requirement. Implicitly, *Telectronics* followed the replacement theory of subclasses by certifying subclasses without addressing the certifiability of the global class.

Similarly, the Eleventh Circuit, in *Klay v. Humana, Inc.*,¹¹⁶ reasoned that although individualized issues would likely predominate in a nationwide class alleging state law causes of action, "if the applicable state laws can be sorted into a small number of groups, each containing materially identical legal standards, then certification of subclasses embracing each of the dominant legal standards can be appropriate."¹¹⁷ *Klay* thus assumed that commonality and predominance, factors that the global class in all likelihood could not meet, could be circumvented through the use of subclasses.¹¹⁸

At least one court, however, has unequivocally rejected (though without explanation) the replacement theory. In *Sprague v. General Motors Corp.*,¹¹⁹ the Sixth Circuit, sitting en banc, confronted a putative class of 50,000 employees claiming violations of ERISA.¹²⁰ The district court certified the class and created four subclasses.¹²¹ The Sixth Circuit reversed. The court first found that the putative class failed the commonality and typicality requirements.¹²² In reference to the subclasses, the court stated perfunctorily: "The district court's use of subclasses did not solve the problem. *Subclasses are not a substitute for compliance with Rule 23.*"¹²³ Although the majority made this statement only in a footnote, the issue was not merely an aside: at least two of the dissenters believed that the use of subclasses could have saved certification.¹²⁴ Nevertheless, the majority gave no inkling as to the reasoning underlying its statement.

The only agency determination I have found that addresses the subclass question is an Equal Employment Opportunity Commission (EEOC) opinion, *DuBuclet v. Department of Health & Human*

¹¹⁵ *Id.* at 287.

¹¹⁶ 382 F.3d 1241 (11th Cir. 2004).

¹¹⁷ *Id.* at 1261-62.

¹¹⁸ For arguments in support of *Klay*'s flexible approach to Rule 23(c)(4), see Cabraser, *supra* note 7, at 1479-84.

¹¹⁹ 133 F.3d 388 (6th Cir. 1998) (en banc).

¹²⁰ *Id.* at 392-93.

¹²¹ *Id.* at 396-97.

¹²² *Id.* at 397-99.

¹²³ *Id.* at 399 n.9 (emphasis added).

¹²⁴ *Id.* at 407 (Lively, J., dissenting) ("I believe, further, the 'typicality' requirement was met by the district court's creation of four subclasses."); *id.* at 414-15 (Martin, C.J., dissenting) (suggesting that subclasses could account for the differences in class commonality and typicality).

Services.¹²⁵ The EEOC regulations have the same certification requirements as Rule 23(a).¹²⁶ They also permit subclasses in language nearly identical to Rule 23(c)(4)(B).¹²⁷ In *DuBuclet*, an EEOC Administrative Examiner found that the class complaint failed the commonality, typicality, and adequacy tests.¹²⁸ The Examiner then stated:

Finally, the examiner is not unaware of the regulations which permit him to create sub-classes as appropriate. The purposes of such a provision, however, is to allow a class which has *previously met class action prerequisites* to continue after an unforeseen conflict of interest arises and in which subclasses are proper corrective measures. *It is not to restructure an initially invalid class*.¹²⁹

Although this statement sets forth the Examiner's belief that subclasses can only be used after a global class has been certified, the Examiner did not give any support or other reasoning for his conclusion.

Thus, although the courts are split as to the role of subclasses in certification decisions, no court has comprehensively analyzed the issue or given a reasoned resolution of it. Instead, the courts have tended to make assumptions one way or another without providing guidance.

IV. INTERPRETATION

In the previous Parts, I introduced the two competing theories of subclassing—the replacement theory and the contingency theory—and demonstrated that no court or commentator has developed a fully reasoned view of the correct interpretation. In this Part, I analyze Rule 23(c)(4)(B)'s text, context, structure, history, and underlying norms to determine which theory is better supported. I conclude that the replacement theory is the better interpretation of Rule 23(c)(4)(B) as written and under current court decisions. There are counterarguments in favor of the contingency theory, but, as I explain below, I do not believe they outweigh those that support the replacement theory.

A. Text

¹²⁵ No. 01820720, 1982 WL 531956 (EEOC Sept. 17, 1982).

¹²⁶ See 29 C.F.R. § 1614.204(d)(2) (2005).

¹²⁷ See *id.* § 1614.204(d)(6) (“When appropriate, the administrative judge may decide that a class be divided into subclasses and that each subclass be treated as a class, and the provisions of this section then shall be construed and applied accordingly.”).

¹²⁸ *DuBuclet*, 1982 WL 531956, at *5-12.

¹²⁹ *Id.* at *12 (emphasis added).

As the Supreme Court has instructed, the interpretation of Rule 23 begins with its text.¹³⁰ Rule 23(c)(4)(B) states: “When appropriate . . . 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.”¹³¹

Taking the last part first, the phrase “construed and applied accordingly” seems straightforward.¹³² When a court divides a class into subclasses, each subclass, to be maintained, separately must satisfy the requirements of Rule 23. Most courts have construed this provision so.¹³³

The more difficult question, for present purposes, is *when* a court can divide a class into subclasses. The Rules do not give any explicit guidance as to when it might be appropriate to do so. Indeed, Rule 23(c)(4) is tautologically unhelpful; its direct response is, well, “[w]hen appropriate.”¹³⁴ The most guidance that can be gleaned from this phrase is that courts have some discretion to use Rule 23(c)(4) to further the goals and protections of Rule 23.

One textual clue is that it must be a “class” that is divided into subclasses. One could interpret the term “class” to mean a class that is itself certifiable under Rule 23(a) and Rule 23(b). This interpretation would support the contingency theory because it posits that a certifiable

¹³⁰ See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (stating that interpretation starts with “the Rule as now composed”).

¹³¹ FED. R. CIV. P. 23(c)(4)(B).

¹³² The phrase certainly applies to subclasses. See Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 51, 56 (1996) (noting that the Advisory Committee even considered an amendment to limit the phrase to Rule 23(c)(4)(B)).

¹³³ See, e.g., *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177, 189 (4th Cir. 1994); *Retired Chicago Police Ass’n v. City of Chicago*, 7 F.3d 584, 599 (7th Cir. 1993) (“Subclasses must satisfy the class action requirements”); *Betts v. Reliable Collection Agency*, 659 F.2d 1000, 1005 (9th Cir. 1981) (“[E]ach subclass must independently meet the requirements of Rule 23”); *Johnson v. Am. Credit Co.*, 581 F.2d 526, 532 (5th Cir. 1978); 1 NEWBERG, *supra* note 5, § 3:9, at 267-68 (stating that “it is generally settled that each subclass must independently satisfy class action criteria”); 3 *id.* § 9:48, at 422-23 (“Subclasses, however, must meet the same class action requirements as any other defined class before certification of the subclass is proper.”); MANUAL FOR COMPLEX LITIGATION, *supra* note 7, § 33.33, at 340 (“Each class or subclass must independently satisfy all the prerequisites of Rules 23(a) and (b).”); 5 MOORE, *supra* note 5, § 23.86[1][c], at 23-352 (“Each subclass must independently satisfy the class action requirements of Rule 23 before it may be certified.”); 7B WRIGHT ET AL., *supra* note 5, § 1790, at 284 (stating that “each subclass must independently meet the requirements of Rule 23 for maintenance of a class action”). Interestingly, however, there is some dispute as to whether each individual subclass must satisfy the numerosity requirement of Rule 23(a). Compare 1 NEWBERG, *supra* note 5, § 3:9, at 268 (asserting that “if the subclass members are also members of the larger, already certified class, they may not be required to satisfy independently the numerosity requirement”), with 5 *id.* § 17:9, at 320-21 (describing a split in court authority on this issue), and 5 MOORE, *supra* note 5, § 23.86[1][c], at 23-353 n.14 (same), and MANUAL FOR COMPLEX LITIGATION, *supra* note 7 § 32.53, at 340 (“The creation of a number of subclasses may result in some that are too small to satisfy the numerosity requirement”).

¹³⁴ FED. R. CIV. P. 23(c)(4).

class is logically antecedent (or at least simultaneous) to any attempt to subclass.

But the rest of Rule 23 does not support that interpretation. The term “class” is used throughout Rule 23 detached from connotations of certifiability. Rule 23(a), for example, assumes that the term “class” describes something that exists prior to, and may even exist without, certification: “One or more members of a class may sue or be sued as representative parties on behalf of all only if [the prerequisites are met].”¹³⁵ Under this formulation, some “classes” will not meet the prerequisites and will be uncertifiable.¹³⁶

This does not mean that a mere “class,” referenced as such in the Rules, cannot also be a certifiable or certified class action (as it must in certain provisions of Rule 23(c)¹³⁷); it just means that the term “class” does not *necessarily* refer to a certifiable class. This interpretation of the term “class” in Rule 23(c)(4) thus supports the replacement theory because an uncertified class may be divided into subclasses.

Another textual clue is the term “subclass.” The Rules do not define the term. Nor does *Black’s Law Dictionary*. But the ordinary meaning is not difficult to divine. A “subclass” most naturally means a subdivision or subset of a class. This is confirmed by the Rule, which states that “a class may be divided into subclasses.”¹³⁸ One might fairly reason that for a subclass to remain a subclass after it is created, the class must continue to exist; otherwise, the subclass would simply become a new class. There can be, in other words, no *subclass* without a class.

There are two problems with this line of reasoning. The first, discussed above, is that the term “class,” as used in Rule 23(c)(4)(B), is not restricted to certifiable classes. Thus, just because the global class cannot be certified does not mean that it ceases to be a class. The global class remains, albeit uncertified, and subclasses (certified or not) may

¹³⁵ *Id.* at R. 23(a).

¹³⁶ One could argue that the term “class action,” rather than the term “class,” is restricted to certifiable classes. *See, e.g., id.* (entitled “Class Actions”) (emphasis added); *id.* at R. 23(a) (entitled “Prerequisites to a Class Action”); *id.* at R. 23(b) (stating that an action “may be maintained as a class action” if the prerequisites are met; *id.* at R. 23(c) (entitled “Determining by Order Whether to Certify a Class Action”); *id.* at R. 23(h) (applying to “an action certified as a class action”); *id.* at R. 23(c)(1), advisory committee’s notes to 1966 amendments (stating that if a class action certification is later determined to be unsound, “the action should be stripped of its character as a class action . . . [and] becomes a nonclass action . . .”). *But see* Class Action Fairness Act of 2005, 109 Pub. L. 2, 119 Stat. 4 (defining “class action” as “any civil action filed” under Rule 23 or an analogous state court rule, without mentioning certification).

¹³⁷ *Id.* at R. 23(c)(1)(B) (“An order certifying a class action must define the class and the class claims, issues, or defenses . . .”); *id.* at R. 23(c)(2)(A) (“For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.”).

¹³⁸ *Id.* at R. 23(c)(4)(B).

then comfortably exist within the ordinary meaning of the term “subclass.”

The second problem is that Rule 23(c)(4)(B) specifically contemplates the transformation of subclasses into ordinary classes by providing that each subclass is then “treated as a class.”¹³⁹ This key provision strongly supports the replacement theory because it naturally reads to permit a court to create subclasses and then essentially eliminate the “sub” by treating them as multiple classes and disregarding the global class. Rule 23(c) further supports the replacement theory because its title groups the topic “Multiple Classes” with “Subclasses.”¹⁴⁰ Oddly enough, the text of the Rule does not mention “multiple classes.” But the Advisory Committee Notes explain, “Two or more classes may be represented in a single action. Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class.”¹⁴¹ This explanation supports the ability of a court to take a global class, divide it into subclasses, and then treat the subclasses as multiple “classes” by disregarding the global class originally presented. Thus, the text of Rule 23(c)(4)(B) supports the replacement theory, not the contingency theory.

Contingency theorists might argue that the phrase “each subclass treated as a class” is only important for purposes of the following phrase: “and the provisions of this rule shall then be construed and applied accordingly.”¹⁴² In other words, the true import of Rule 23(c)(4)(B) is that subclasses must independently satisfy Rule 23(a) and (b), and the only way to link subclasses to the certification requirements is to call them “classes” for the purposes of certification.

Though plausible, this interpretation is unlikely. The text does not by its terms limit the term “class” only for the purposes of imposing the certification requirements. In addition, far less convoluted phrasing would have accomplished that goal. For example, the drafters could have written: “When appropriate . . . a class may be divided into subclasses . . . and the provisions of this rule shall then be construed and applied [to those subclasses].”¹⁴³ In short, the phrase “each subclass treated as a class” supports the transformation of subclasses into multiple classes. For these reasons, the text of Rule 23(c)(4)(B) strongly supports the replacement theory.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at R. 23(c).

¹⁴¹ *Id.* at R. 23(c)(4), advisory committee’s notes to 1966 amendment.

¹⁴² *Id.*

¹⁴³ *Id.* at R. 23(c)(4)(B).

B. Context

The subclassing provision is intertwined with the issue class provision. Rule 23(c)(4) reads, in full: “When appropriate (A) an action may be brought or maintained as a class action with respect to individual 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.”¹⁴⁴ Because the two provisions are intertwined, the interpretation of the scope of issue classes under Rule 23(c)(4)(A) could help interpret the scope of subclasses under Rule 23(c)(4)(B).

Although commentators do not agree on the proper interpretation of Rule 23(c)(4)(A),¹⁴⁵ a growing majority of courts supports an interpretation of Rule 23(c)(4)(A) that permits certification of particular issues even if the global action cannot itself satisfy the certification requirements. The adoption of such a view supports a similar interpretation of Rule 23(c)(4)(B).

For example, in *Gunnells v. Healthplan Services, Inc.*,¹⁴⁶ purchasers and beneficiaries of a multi-employer health care plan brought class action claims growing out of the plan’s collapse. The Fourth Circuit held that a class action could be maintained as to a particular issue (a particular claim brought by the class) under Rule 23(c)(4)(A) despite finding that the global class failed to satisfy the Rule 23(b)(3) requirement for all claims.¹⁴⁷

The dissent took the position that “even in cases involving the certification of issue-only classes, the common issues must predominate over questions affecting only individual members of the class in the context of the action *as a whole*,”¹⁴⁸ and that Rule 23(b) serves as the “gates” through which every action must first pass before Rule 23(c) is to be considered.¹⁴⁹ The majority, of course, disagreed. It viewed the dissent’s sequentialist argument as backwards: Rule 23(c)(4)(A) permits the bringing or maintenance of an issue class *before* application of Rules 23(a) and (b).¹⁵⁰ It also reasoned that if Rule 23(c)(4) could only be considered *after* certification, then the “manageability” provisions of

¹⁴⁴ *Id.* at R. 23(c)(4).

¹⁴⁵ *See supra* note 7.

¹⁴⁶ 348 F.3d 417 (4th Cir. 2003).

¹⁴⁷ *Id.* at 428-34.

¹⁴⁸ *Id.* at 448 (Niemeyer, J., dissenting) (emphasis added).

¹⁴⁹ *Id.* at 449 (Niemeyer, J., dissenting). I note that the dissent took the view that not even the contingency theory does—that Rule 23(c)(4) cannot even help a global class itself meet the certification requirements.

¹⁵⁰ *Id.* at 439.

Rule 23(c)(4) could have no impact on the manageability requirement of Rule 23(b)(3), a result at odds with the purpose of Rule 23(c)(4) in the first place.¹⁵¹ Finally, it relied on prior Fourth Circuit precedent.¹⁵²

In *Chiang v. Veneman*,¹⁵³ the Third Circuit adopted a similar interpretation of Rule 23(c)(4)(A). The Department of Agriculture appealed from the certification of a class of minorities and women from the Virgin Islands discriminated against in the administration of loan programs.¹⁵⁴ The court noted that two issues were ripe for class adjudication even though individual issues could predominate in other areas.¹⁵⁵ Accordingly, it isolated issue classes under Rule 23(c)(4)(A) and proceeded to determine that Rule 23(b)(3)'s predominance requirement was met with respect to those issues.¹⁵⁶

The Second and Ninth Circuits have hinted at their support for this interpretation. In *Valentino v. Carter-Wallace, Inc.*,¹⁵⁷ a district court certified, without elaboration, a nationwide class and subclass in a products liability case against the manufacturer of a drug used to treat epilepsy.¹⁵⁸ On appeal, the Ninth Circuit stated:

Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy. . . . Even if the common questions do not predominate over the individual questions so that class certification is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues.¹⁵⁹

And in *Robinson v. Metro-North Commuter Railroad Co.*,¹⁶⁰ the Second Circuit, while not directly addressing the issue itself, directed lower courts to pay heed to the Ninth Circuit's ruling in *Valentino*.¹⁶¹

¹⁵¹ *Id.* ("Thus, under the dissent's reading of Rule 23, a court could only use subsection (c)(4) to manage cases that the court had already determined would be manageable *without* consideration of subsection (c)(4). This reading leaves subsection (c)(4)(A) without any practical application, thereby rendering it superfluous.")

¹⁵² *See, e.g., Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir. 1992) (quoting *In re A.H. Robins Co.*, 880 F.2d 709, 728 (4th Cir. 1989)):

This court also has admonished district courts to "take full advantage of the provision in [Rule 23(c)(4)] permitting class treatment of separate issues" in order "to promote the use of the class device and to reduce the range of disputed issues" in complex litigation. . . . [I]f an action "includes multiple claims, one or more of which might qualify as a certifiable class claim, the court may separate such claims from other claims in the action and certify them under the provisions of subdivision (c)(4)."

¹⁵³ 385 F.3d 256 (3d Cir. 2004).

¹⁵⁴ *Id.* at 259.

¹⁵⁵ *Id.* at 267.

¹⁵⁶ *Id.* at 273.

¹⁵⁷ 97 F.3d 1227 (9th Cir. 1996).

¹⁵⁸ *Id.* at 1228.

¹⁵⁹ *Id.* at 1234.

¹⁶⁰ 267 F.3d 147 (2d Cir. 2001).

The lone contrarian is the Fifth Circuit. In *Castano v. American Tobacco Co.*,¹⁶² the Fifth Circuit stated, in the context of an issue class action under Rule 23(c)(4)(A):

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 the common issues for a class trial. . . . Reading rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.¹⁶³

The Fifth Circuit has twice reaffirmed *Castano*,¹⁶⁴ though there is some indication that it is striking a more nuanced position. In *Bolin v. Sears, Roebuck & Co.*,¹⁶⁵ the Fifth Circuit supported certification on a claim-by-claim basis, rather than a holistic basis, and noted that “Rule 23(c)(4) explicitly recognizes the flexibility that courts need in class certification by allowing certification ‘with respect to particular issues’ the division of the class into subclasses.”¹⁶⁶

Despite *Castano*, a solid majority of circuit courts¹⁶⁷ agrees that Rule 23(c)(4)(A) can be used to certify a class with respect to particular issues even if the global action is not itself certifiable. Reading Rule 23(c)(4)(A) and Rule 23(c)(4)(B) *in pari materia*,¹⁶⁸ that interpretation of issue classes suggests that a similar interpretation should apply to

¹⁶¹ *Id.* at 167 n.12.

¹⁶² 84 F.3d 734 (5th Cir. 1996).

¹⁶³ *Id.* at 745 n.21 (citation omitted).

¹⁶⁴ See *Smith v. Texaco, Inc.*, 263 F.3d 394, 409 (5th Cir. 2001), *withdrawn*, 281 F.3d 477 (5th Cir. 2002); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 422 (5th Cir. 1998).

¹⁶⁵ 231 F.3d 970 (5th Cir. 2000).

¹⁶⁶ *Id.* at 976.

¹⁶⁷ District courts have also split. Compare *Taylor v. D.C. Water & Sewer Auth.*, 205 F.R.D. 43 (D.D.C. 2002) (certifying common issues in a hybrid class action), and *Emig v. Am. Tobacco Co.*, 184 F.R.D. 379, 395 (D. Kan. 1998) (explaining that Rule 23(c)(4)(A) permits “adjudication of any issues common to the class even though the entire litigation may not satisfy the requirements of Rule 23”), with *Rink v. Cheminova, Inc.*, 203 F.R.D. 648 (M.D. Fla. 2001) (refusing to certify an issue class), and *Cohn v. Mass. Mut. Life Ins. Co.*, 189 F.R.D. 209 (D. Conn. 1999) (same).

¹⁶⁸ The canon of statutory construction *in pari materia* (literally, in the same matter) instructs a court to construe provisions pertaining to the same subject matter as if they were one law. See *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972); BLACK’S LAW DICTIONARY 807 (8th ed. 2004). The Supreme Court has read certain closely-tied provisions of statutes *in pari materia* to aid one provision’s interpretation. See, e.g., *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996) (stating that 28 U.S.C. § 1447(c) should be read *in pari materia* with § 1447(d)).

subclassing. Accordingly, the current circuit caselaw on Rule 23(c)(4)(A) supports the replacement theory for Rule 23(c)(4)(B).

C. *Structure*

In contrast to the support for the replacement theory provided by the text and context of Rule 23(c)(4)(B), the location of the subclass provision in Rule 23(c), in the midst of other procedural and housekeeping provisions, lends support for the contingency theory. In this section, I give credit to that argument but explain why, on balance, this structural argument is not as persuasive as the textual argument.

As a general matter, Rules 23(a) and (b) are the substantive requirements for class certification. Rule 23(a) lists the “prerequisites” to a class action.¹⁶⁹ If those “prerequisites” are “satisfied,” then the “action may be maintained as a class action” if one of the Rule 23(b) requirements is also satisfied.¹⁷⁰ Rules 23(a) and (b) contain the nuts and bolts of certification.

Rule 23(c), in contrast, is not a “prerequisite” to anything. It deals with a hodgepodge of housekeeping matters, as its title illustrates: “Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.”¹⁷¹ Subsection (c)(1), for example, requires a court to order certification, if warranted, “at an early practicable time,”¹⁷² to define the class, and to appoint class counsel.¹⁷³ Rule 23(c)(1) also permits a certification order to be “altered or amended before final judgment.”¹⁷⁴ Rule 23(c)(2) pertains to notice to class members.¹⁷⁵ Rule 23(c)(3) directs a judgment to specify the class

¹⁶⁹ FED. R. CIV. P. 23(a).

¹⁷⁰ *Id.* at R. 23(b).

¹⁷¹ *Id.* at R. 23(c).

¹⁷² *Id.* at R. 23(c)(1)(A).

¹⁷³ *Id.* at R. 23(c)(1)(B).

¹⁷⁴ *Id.* at R. 23(c)(1)(C).

¹⁷⁵ *Id.* at R. 23(c)(2).

members to which it pertains.¹⁷⁶ In the midst of these are the subclassing and issue class provisions of Rule 23(c)(4).¹⁷⁷

The subclassing provision is placed in the management provisions of Rule 23(c), rather than in the certification requirement provisions of Rule 23(a) or Rule 23(b). As recited above, Rule 23(c) deals with housekeeping issues and due process protections, not class certification requirements. It most naturally comes into play only *after* the “prerequisites” of Rule 23(a) have been met and perhaps even after a class action is deemed “maintainable” under Rule 23(b). Thus, the location of the subclassing authorization, in Rule 23(c) rather than in Rule 23(a) or Rule 23(b), supports the contingency theory—that Rule 23(c) applies only after (or at least at the same time that) a class has met the requirements of Rule 23(a) and Rule 23(b).¹⁷⁸ The replacement theory, in other words, puts the cart before the horse.

This is a plausible argument, and at the very least it should serve as a call to the Rules Committee and the Court for clarification of the proper scope of Rule 23(c)(4). Ultimately, however, it is less persuasive than the textual argument for three reasons.

First, the replacement theory is not necessarily any more a “certification” issue than it is a “management” issue. Indeed, one could argue that the replacement theory is *more* of a management issue than a certification issue because it merely focuses, tracking the text of Rule 23(c)(4)(B), on dividing a global class (certifiable or not) into subclasses. Certification comes into play only tangentially—as the basis for maintaining them once they are defined.

Second, Rule 23(c) itself speaks to certification issues and so cannot be restricted to non-certification “management” issues. Rule 23(c)(4) states that for subclasses (and likely issue classes as well), “the provisions of this rule [i.e., Rules 23(a) and (b)] shall then be construed

¹⁷⁶ *Id.* at R. 23(c)(2)(B). The rule states that:

The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

Id.

¹⁷⁷ *Id.* at R. 23(c)(4).

¹⁷⁸ At least one commentator and one court have adopted this same reasoning for the conclusion that Rule 23(c)(4)(A) is not a certification substitute for failure to meet Rule 23(b)(3)’s predominance requirement. *See, e.g., Hines, End-Run, supra* note 7, at 712; *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996). However, as I mentioned, the commentary is not in consensus on this issue, *see supra* note 7, and a majority of courts have rejected it, *see supra* text accompanying notes 146-167.

and applied accordingly.”¹⁷⁹ As I mentioned above, this provision has been interpreted to mean that each subclass (or issue class) must then satisfy Rules 23(a) and (b) before being certified.¹⁸⁰ If so, then it addresses certification at least as much as the replacement theory does. Indeed, by forcing a court to address Rule 23(a) and (b) certification issues *after* creating subclasses under Rule 23(c), Rule 23(c) itself puts the cart before the horse. In addition, Rule 23(c)(1) also speaks to certification issues, rather than “management” issues, because it addresses when certification should be determined.¹⁸¹

Third, the step-wise theory that Rules 23(a) and (b) are “gateways” through which the case must pass before reaching Rule 23(c) manifests a rigidity that is contrary to the flexibility inherent in Rule 23. Certification is designed to be a give-and-take process: Rule 23(c)(1)(C) allows a court to revisit certification issues at any time before final judgment.¹⁸² And the manageability provisions of Rule 23(c) must be designed to work in tandem with the requirement of superiority of Rule 23(b)(3); it would be odd for a court confronted with a Rule 23(b)(3) class to determine whether or not the class is manageable without looking to the Rule 23(c) provisions specifically addressing manageability issues.

In short, the argument based on structure—though I give it much credit—is substantially undermined by the text and spirit of Rule 23, and therefore it simply does not balance the far clearer textual support for the replacement theory.

D. *Drafting History*

The intentions of the drafters are an important consideration in understanding the meaning of the subclassing provision,¹⁸³ particularly because Rule 23(c)(4)(B) has not substantially changed since enacted in 1966.¹⁸⁴ As the Supreme Court has instructed, “we are bound to follow

¹⁷⁹ FED. R. CIV. P. 23(c)(4).

¹⁸⁰ See *supra* note 132-133 and accompanying text.

¹⁸¹ FED. R. CIV. P. 23(c)(1)(A). Before the 2003 amendments to Rule 23(c), Rule 23(c)(1) even permitted “conditional” certification, which clearly allowed certification before the conditions of Rule 23(a) and (b) had been met. *Id.* at R. 23(c)(1) (1966) (amended 2003).

¹⁸² *Id.* at R. 23(c)(1)(C).

¹⁸³ See Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1152-69 (2002) (arguing for interpretation based on drafter intent). But see John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 373 (2000) (criticizing *Ortiz* for favoring “rule formalism” over “due process”).

¹⁸⁴ Compare FED. R. CIV. P. 23(c)(4) (2005), with *id.* at R. 23(c)(3) (1966).

Rule 23 as we understood it upon its adoption.”¹⁸⁵ The Advisory Committee’s Notes are indices of the drafters’ intentions,¹⁸⁶ as are the sentiments of the Committee’s members and its official reporter, Benjamin Kaplan.¹⁸⁷ Unfortunately, neither the Rule’s commentary nor the drafting history sheds much light on the meaning of subclassing’s role in certification. At best, they only modestly support the replacement theory.

1. The Advisory Committee’s Notes

As noted above, the original commentary on Rule 23(c)(4)(B), though sparse, tends to support the replacement theory because it tracks the text by recognizing that “[t]wo or more classes may be represented in a single action,” and that when subclasses are created, each is “treated as a class.”¹⁸⁸

In fairness, other portions of the Advisory Committee’s Notes could be read to undermine their support for the replacement theory. In the commentary on Rule 23(b)(3), the Committee suggested that mass accidents usually should not be certified because individualized issues generally predominate over the common issues, and such a class action would degenerate into multiple lawsuits individually tried.¹⁸⁹ The Committee did not suggest, as the replacement theory does, that a possible solution would be to subclass until common issues predominated over individual issues in each subclass. One might have expected the Committee to spend more time discussing Rule 23(c)(4)(B)’s application to Rule 23(b)(3) classes had the Committee strongly believed in the replacement theory.¹⁹⁰ Thus, the Advisory

¹⁸⁵ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-25 (1997) (looking to the Advisory Committee’s drafting history); see also Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?*, 74 TUL. L. REV. 1709, 1724-25 (2000) (interpreting *Ortiz* as favoring an “originalist stance for Rule 23”).

¹⁸⁶ See Struve, *supra* note 183, at 1156 (stating that the “most logical evidence of such intent can be found in the Rule’s text and Advisory Committee Notes”); 4 WRIGHT ET AL., *supra* note 5, § 1029 (stating that the Notes provide “something akin to a ‘legislative history’ of the rules”).

¹⁸⁷ See *Ortiz*, 527 U.S. at 833, 834, 842-45 (citing the published views of Benjamin Kaplan); *id.* at 882 (Breyer, J., dissenting) (stating that the majority properly relied on Kaplan’s views for explanation); *id.* at 844 & n.20 (citing Committee meeting excerpts); *id.* at 834 n.14 (citing a letter from Kaplan to another Committee member); 4 WRIGHT ET AL., *supra* note 5, § 1029 (noting the respect given the views of individual Committee members).

¹⁸⁸ FED. R. CIV. P. 23(c)(4), advisory committee’s notes to 1966 amendment.

¹⁸⁹ *Id.* at R. 23(b)(3), advisory committee’s notes to 1966 amendment.

¹⁹⁰ More recent commentary added to Rule 23(b)(3) states that “[f]ollowing a determination of liability, for example, proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class.” *Id.* at R. 23(c), advisory committee’s notes to 2003 amendment. This description is unhelpful in resolving the proper role for subclasses, for it

Committee's Notes could be read to undermine the support for the replacement theory.

However, this reading relies on the tenuous inference that the Committee did not discuss the issue in more depth because it did not accept the replacement theory. The Committee could have declined to discuss Rule 23(c)(4)(B) in that portion of the commentary for any number of reasons, including for the reason that it wished to focus on the meaning of Rule 23(b)(3), not Rule 23(c)(4). In addition, a similar inferential argument could be made in support of the replacement theory: if the text supports the replacement theory but the Committee did not, one would have expected the Committee to have clarified Rule 23(c)(4)(B) by stating that subclasses should not be considered unless the entire action could be maintained under Rule 23(b)(3).

On balance, the Advisory Committee's Notes provide some support for the replacement theory, but only because they confirm the textual interpretation.

2. Rules Committee Drafting Record

Despite the volume of drafting history primary source materials kept on file at the Rules Committee Support Office,¹⁹¹ clues from the drafting history are nearly as sparse. The drafters spoke little of the subclassing section. The only discussions I have found that pertain specifically to the subclassing language occur during some of the very first comments on the new section.

In the most prominent discussion of Rule 23(c)(4), Professor Charles Alan Wright wrote to Reporter Benjamin Kaplan, complaining that Rule 23(c)(4) "seems to me the kind of picky detail which does not require statement in the rule" and questioning whether the provision was in accordance with the law, although he did not elaborate as to why.¹⁹² Responding, Kaplan and Committee Member Albert M. Sacks wrote:

appears to assume that the class has already been certified.

¹⁹¹ These materials are available on microfiche at the Administrative Office of the U.S. Courts in Washington, D.C. Fortunately, many that I reference here have been appended to an article by Professor Laura Hines. See Hines, *End-Run*, *supra* note 7, at 765-70. For convenience, I add a citation to her article for these primary source materials where appropriate.

¹⁹² See Letter from Prof. Charles Alan Wright to Benjamin Kaplan, at 3 (Mar. 30, 1963), reprinted in COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 1935-88, CONGRESSIONAL INFORMATION SERVICE RECORDS OF THE U.S. JUDICIAL CONFERENCE, No. CI-7001, at 41 [hereinafter U.S. JUDICIAL CONFERENCE, No. CI-7001]; see also Hines, *End-Run*, *supra* note 7, at 765-66.

Certainly it is the law: . . . the reality of the class-subclass situation is manifested when courts, speaking of inadequacy of representation, observe that besides the interests shared by all members of the class, there are special interests shared only by particular groupings within the class. We think [the subclassing provision], although making obvious points, is useful for the sake of clarity and completeness.¹⁹³

Upon receiving that response, Professor Wright withdrew his objection and accepted Kaplan's assertion that the subclassing provision language accurately reflected existing law, although he noted that he still harbored lingering (if unexplained) doubts.¹⁹⁴

Kaplan's example illustrates the quintessential subclassing problem—adequacy of representation—and suggests that subclassing can isolate those subgroups with different interests in order to provide effective representation for them. The contingency and replacement theories are not concerned with this power of subclassing.

Thus, one plausible interpretation of this brief dialogue is that Kaplan's example illustrates just one of the most common ways the subclassing provision can be effective but by no means is indicative of any limitations on the provision. Kaplan does not go so far as to suggest that the subclassing provision cannot save a global class if it failed other class requirements.

Indeed, in a later article, Kaplan lauded the broad power of judicial initiative to find creative solutions to class questions, stating:

The reform of Rule 23 was intended to shake the law of class actions free of abstract categories . . . and to rebuild the law on functional lines responsive to those recurrent life patterns which call for mass litigation through representative parties And whereas the old Rule had paid virtually no attention to the practical administration of

¹⁹³ See Memorandum from Benjamin Kaplan to the Chairman and Members of the Committee (Sept. 12, 1963), reprinted in U.S. JUDICIAL CONFERENCE, No. CI-7001, *supra* note 192, at 52; see also Hines, *End-Run*, *supra* note 7, at 766-68. In the only other elaboration of subclassing that I could find in the annals, Kaplan wrote: "Then we have a further provision about the division of classes into sub-classes, which looks to the proper conduct of the suit. You may have a group of people who are aligned in interest as to certain matters, but may split up as to others, and in such a case, one can speak properly of classes and sub-classes." Transcript of Civil Rules Advisory Committee Meeting, Amendment Proposal EE—Class Actions, reprinted in COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 1935-88, CONGRESSIONAL INFORMATION SERVICE RECORDS OF THE U.S. JUDICIAL CONFERENCE, No. CI-7104, at 53 [hereinafter U.S. JUDICIAL CONFERENCE, No. CI-7104] (remarks of Reporter Benjamin Kaplan); see also Hines, *End-Run*, *supra* note 7, at 768-69.

¹⁹⁴ See Letter from Prof. Charles Alan Wright to Benjamin Kaplan, at 4 (Sept. 23, 1963), reprinted in COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 1935-88, CONGRESSIONAL INFORMATION SERVICE RECORDS OF THE U.S. JUDICIAL CONFERENCE, No. CI-7002, at 17 ("I withdraw my objection to Rule 23(c)[(4)]. When Ben Kaplan and Al Sacks tell me that 'certainly it is the law,' that settles that it is indeed the law, and I rue my own ignorance in having earlier expressed doubt. . . . Despite what you now say, I remain in dubitante about 23(c)[(4)] . . ."); see also Hines, *End-Run*, *supra* note 7, at 768.

class actions, the revised Rule dwelt long on this matter—not, to be sure, by prescribing detailed procedures, but by confirming the courts' broad powers and inviting judicial initiative.¹⁹⁵

Though he did not mention Rule 23(c)(4) specifically in this passage, such sentiments suggest that courts can use such management provisions broadly and in ways that would support the replacement theory.

In addition, Professor Wright's treatise on civil procedure adopts a similarly broad view of Rule 23 and, in fact, advocates the replacement theory.¹⁹⁶ This would suggest that Professor Wright ultimately understood both Kaplan to mean and the law to be that courts could subdivide uncertifiable classes and just address certification of the subclasses.

On the other hand, Kaplan, in his discussion with Professor Wright, explicitly referred to a global class that had already satisfied the commonality test. If Kaplan envisioned a subclassing mechanism that could replace the global class with smaller subclasses, the fact that the global class satisfied the commonality test would be irrelevant. Because he mentioned it, one could argue that Kaplan believed it necessary that the global class at least meet the commonality requirement for the subclassing mechanism to provide relief.

Also, what seems abundantly clear is that Kaplan and the Committee Members agreed that the subclassing provision was somewhat "obvious" and merely a "detail."¹⁹⁷ Even in his later writings, when Kaplan explicated the new Rule 23 in some detail, he devoted nothing more than a passing footnote to Rule 23(c)(4).¹⁹⁸ If the drafters considered Rule 23(c)(4)(B) to encompass the replacement theory, one might expect to find discussion of subclassing far more extensive and characterization of subclassing as something far more powerful than a "detail" in the drafting history.¹⁹⁹

As argued above, however, this line of inferential reasoning is somewhat uncertain, and I am hesitant to credit it in light of the other evidence supporting the replacement theory. On balance, the most that can be said about the dialogue between Kaplan and Wright during the

¹⁹⁵ Benjamin Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497 (1969).

¹⁹⁶ 7A WRIGHT ET AL., *supra* note 5, § 1778, at 546 (suggesting that subclassing could make the common issues in the subdivided class action predominate for the purposes of Rule 23(b)(3)).

¹⁹⁷ Transcript of Civil Rules Advisory Committee Meeting, Amendment Proposal EE—Class Actions, *reprinted in* U.S. JUDICIAL CONFERENCE, No. CI-7104, *supra* note 193, at 53 (remarks of Reporter Benjamin Kaplan); Letter from Prof. Charles Alan Wright to Benjamin Kaplan, at 3 (Mar. 30, 1963), *reprinted in* U.S. JUDICIAL CONFERENCE, No. CI-7001, *supra* note 192, at 41; *see also* Hines, *End-Run*, *supra* note 7, at 765-66, 768-69.

¹⁹⁸ Kaplan, *supra* note 30, at 393 n.144.

¹⁹⁹ *Cf.* Hines, *End-Run*, *supra* note 7, at 754 (making the same argument for the Advisory Committee Notes and Rule 23(c)(4)(A)).

drafting committee's work on Rule 23 is that it sheds little light on the proper meaning or role of subclassing.

E. *Efficiency and Workability*

As with the interpretation of the drafting history, the effects of the two competing interpretations on the efficiency²⁰⁰ and workability of class actions do not strongly support either theory. Take the following scenario, for example. Plaintiff seeks the broadest class possible. At certification, Plaintiff acknowledges that his global class cannot meet the Rule 23 requirements with or without subclasses, but argues that the class should be subdivided into subclasses A, B, and C, which each independently satisfy Rule 23. If a court follows the replacement theory, it will certify subclasses A, B, and C, and the case will proceed in the same scope that Plaintiff initially sought, albeit in three chunks. If, however, a court follows the contingency theory, it will refuse to certify any class and proceed only with Plaintiff's individual claims. Non-certification, however, does not prevent different plaintiffs from simply refileing three independent class actions equivalent in scope to the subclasses A, B, and C. Indeed, if the joinder rules permit it, the original Plaintiff could simply amend his complaint to allege three different classes rather than filing separate class actions.

Advocates of the replacement theory could answer that efficiency and workability are hindered by the result caused by the contingency theory because the class must start all over again with considerable repetition of time, expense, and effort. Parties to a class action may, and generally do, seek some discovery prior to certification, which can be costly and time consuming. In addition, the presiding judge develops some familiarity with the factual and legal issues, parties, and attorneys involved. Under the contingency theory, discovery would have to begin anew, possibly before a different judge (or multiple different judges, if one or more of the three new actions is assigned to a different judge) who knows nothing about the case or the individuals involved. Certain factual or legal issues resolved or argued prior to certification may have to be relitigated. And, finally, because certification is often a highly contentious issue, the time between filing and a certification decision could span several years and cost enormous sums of money on both sides. In such cases, some plaintiffs may have a statute of limitations problem, or they may no longer be willing (or able) to be class members. A replacement theorist would argue that these costs to

²⁰⁰ See Rubenstein, *supra* note 44, at 434 (citing efficiency as the "primary argument for aggregation in mass tort cases").

efficiency are unnecessary in light of the nearly equivalent end effect of certification of smaller but multiple classes. Efficiency and cost-effectiveness is, after all, what Rule 23 is all about.

Advocates of the contingency theory could respond that the costs inherent in their theory will cause the plaintiff to evaluate his class more carefully at the outset. If the class is sustainable only in parts, then the plaintiff should bring it as such. And, when that happens, economy and efficiency are furthered by less contentious certification issues. In other words, the market will right itself and produce the most efficient result.

The problem with this argument is that it may not be feasible for the plaintiff to know, before any discovery, what the proper scope of the class action should be. Indeed, class actions are designed to be flexible so that the proper scope can be developed during the initial stages of the litigation and then be decided at certification. It is therefore doubtful that the market will right itself in this case. It is more likely that, if the contingency theory governed, a very few class plaintiffs would approximate the proper scope of the class properly, many others would underestimate the size of the class and exclude otherwise viable claims out of the fear of failing certification and facing large costs, and many others would still overestimate the size of their class, even in a good faith attempt to get the scope right, because they do not possess sufficient facts to make an accurate determination.

In addition, such a rigid all-or-nothing approach to certification is contrary to the spirit of flexibility in Rule 23. As I explained above, the certification process is a give-and-take development of an understanding of the case and where the Rule 23 boundaries should be drawn. Rule 23(c)(1) is specifically designed to address class scope issues after the class is defined and certified and provides for certification “at an early practicable time” to allow for proper factual development to ascertain the proper scope of the class after the complaint is filed.²⁰¹

A stronger argument for the contingency theory is that the elimination of the global class from consideration could create a preposterous combination of subclasses. One can imagine, for example, the replacement theory extended to its logical conclusion: that *any* class could be broken down into thousands, or even millions, of individual subclasses—each with its own representative, common issues, and legal counsel—as long as each subclass independently satisfies Rule 23(a) and Rule 23(b).²⁰² In another direction, one can imagine the

²⁰¹ FED. R. CIV. P. 23(c)(1)(A) (directing courts to certify “at an early practicable time”); *id.* at R. 23(c)(1)(C) (“An order [of certification] may be altered or amended before final judgment.”).

²⁰² As one commentator has suggested, issue classes allow a court to isolate the common issues for class certification and leave the uncommon issues for individualized litigation so that

replacement theory generating completely *uncommon* subclasses if the global class no longer needs to satisfy Rule 23(a)(2)'s commonality requirement of one common issue uniting the class. Finally, consider a gender discrimination action alleging that a tap-on-the-shoulder system permits illegal gender bias to infect a company's promotion criteria.²⁰³ The replacement theory would support such a claim being brought by *both men and women in the same class*—its solution would just be to create a subclass of men and a subclass of women.

If the global class must still satisfy Rule 23, as the contingency theory dictates, then a court can easily deny certification of these odd developments.²⁰⁴ Under the replacement theory, however, one could argue that a court considers only the certifiability of the subclasses, and if each independently satisfies Rule 23, then that court should certify them, irrespective of the manageability problems they cause as a group.

Although these odd situations present an intriguing thought experiment, I am convinced that courts have tools at their disposal to ensure that they do not arise in practice. Rule 23(c)(1) allows a court considerable flexibility in defining and modifying the class.²⁰⁵ In addition, Rule 23(d) grants a court the power to make appropriate orders “determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument”²⁰⁶ or “imposing conditions on the representative parties or on intervenors.”²⁰⁷ Also, nothing in Rule 23(b)(3) restricts the superiority inquiry to so narrow a focus as the particular class or subclass under scrutiny without consideration to other related cases or classes that may affect the maintainability or integrity of the class at issue. Finally, Rule 23(c)(4)(B) itself grants courts authority to subclass only “when appropriate,” and even then the court “may”—but need

the “issue class” will *always* satisfy commonality and predominance. See Shapiro, *supra* note 7, at 958.

²⁰³ See, e.g., *Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004).

²⁰⁴ For example, the court could hold that too many subclasses make the global class unmanageable under Rule 23(b)(3). See *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177, 189 (4th Cir. 1993) (reversing a certification of a class with causes of action arising under several different states' laws and rejecting the district court's attempt to create subclasses by state because the subclasses would “pose management difficulties and reduce the judicial efficiency sought to be achieved through certification”); *MANUAL OF COMPLEX LITIGATION*, *supra* note 7, § 21.23, at 340-41 states:

The creation of a number of subclasses may . . . make the case unmanageable, or, in a Rule 23(b)(3) suit, may defeat the superiority requirement. Denial of class status in such circumstances is appropriate; if conflicts and differences among class members are so sharp that a number of small subclasses result, class treatment may not be justified in the first place.

²⁰⁵ FED. R. CIV. P. 23(c)(1).

²⁰⁶ *Id.* at R. 23(d)(1).

²⁰⁷ *Id.* at R. 23(d)(3).

not—subclass.²⁰⁸ In short, even if these horribles were ever to parade before a court, it would have the means to deal with them.²⁰⁹

In sum, therefore, efficiency and workability supports the replacement theory.

F. *Supreme Court*

As I discussed above, the Supreme Court has not resolved the conflict between the two theories of subclassing. However, a close analysis of one of the cases I discussed above does provide some support for the contingency theory, and I feel obliged to address it.

In *Amchem Products, Inc. v. Windsor*,²¹⁰ the Supreme Court reversed certification of the settlement class because it failed to meet the adequacy and predominance requirements of Rule 23. In discussing the deficiency of representation, the Court several times alluded to the lack of subclasses,²¹¹ suggesting that, in the Court's view, Rule 23(c)(4)(B) could have helped the class overcome its divergences to satisfy Rule 23(a)(4).²¹²

In contrast to its discussion on adequacy, however, the Court did not opine on subclasses in the context of the predominance deficiency. The Court merely stated: "Given the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions, any overarching dispute about the health consequences of asbestos exposure cannot satisfy the Rule 23(b)(3) predominance standard."²¹³ The Court did not consider whether subclasses could have remedied the predominance problem by, for example, isolating disparate interests to permit commonality to predominate within each subgroup individually. The Court's failure to suggest subclasses in this instance, when considered in light of its suggestion that subclasses

²⁰⁸ *Id.* at R. 23(c)(4).

²⁰⁹ Rule 23 could benefit from clarification on this point, however.

²¹⁰ 521 U.S. 591 (1997).

²¹¹ *Id.* at 626 (stating that "named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses"); *id.* at 627 ("Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency."); *id.* ("Where differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups.") (quoting *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 742-43 (2d Cir. 1992)).

²¹² *Id.* at 626-27. The dissent appeared to agree. *Id.* at 636 (Breyer, J., dissenting) ("These differences might warrant subclasses, though subclasses can have problems of their own.")

²¹³ *Id.* at 624.

could aid typicality, could imply that the Court did not believe that subclassing could remedy the predominance problems. This part of *Amchem* could support, inferentially, the contingency theory.

Additional support for the contingency theory comes from the Court's discussion of Rule 23(e). In rejecting the argument that Rule 23(e) provides an independent mechanism for certifying classes for settlement purposes if the settlement is "fair," the Court reasoned that Rule 23(e), unlike Rule 23(a) and (b), was not designed to assure class cohesion.²¹⁴ Rule 23(e), instead, was designed as an *additional* requirement, not a superseding one.²¹⁵ Although *Amchem* did not make the analogy, one could argue that Rule 23(c)(4) operates the same way: that Rule 23(c)(4), placed outside of the certification requirement sections of Rule 23(a) and (b), and placed instead among the housekeeping sections of Rule 23, is no substitute for Rule 23(a) and (b) compliance but rather is an additional requirement that can be implemented only when Rule 23(a) and (b) have been met.

But the Court could have failed to mention subclasses in the predominance discussion for any number of reasons, and the Court did not itself draw any analogy between Rule 23(e) and Rule 23(c).²¹⁶ Thus, my response to these arguments is that they are interpretations of Supreme Court language from a case that does not primarily focus on Rule 23(c)(4) and that until the Court provides more than this tangential guidance, the text of the Rule and the other support for the replacement theory should prevail.

CONCLUSION

Subclassing and certification are topics whose paths are likely to cross more and more in the near future. In this Article, I have attempted to show that the current body of law and commentary is unsettled on whether subclasses can completely replace consideration of the global class or whether subclasses can only be certified if the global class is also certified. I have also attempted to demonstrate that the best interpretation of Rule 23(c)(4)(B)—as written, and under the current Supreme Court precedent and prevailing circuit sentiment—is the replacement theory. I have done so while making the strongest

²¹⁴ *Id.* at 620-21, 623.

²¹⁵ *Id.* at 620-21.

²¹⁶ Though I find them too tangential to this Article to address them in significant depth, there are good reasons to resist analogizing Rule 23(e) to Rule 23(c) in this instance. For example, Rule 23(e)(1) *restricts* the power of the court to approve a class settlement, whereas Rule 23(c)(4) *grants* the court the power to subclass.

arguments for the contingency theory along the way. I do not believe that these arguments are so easily dismissed. Indeed, they have much to commend them. They are, in my opinion, strong enough to call into doubt the *certainty* of the replacement theory as the correct interpretation (although I think, for all of the reasons stated above, that it is the *best* interpretation).

In light of that, I would be remiss not to address two issues that the replacement theory may implicate with the new Class Action Fairness Act of 2005, or CAFA.²¹⁷ Because CAFA is so new, its substantive provisions have been examined too infrequently to make this a detailed analysis, so I include this brief discussion only in my concluding thoughts and leave a deeper analysis for another day.

First, CAFA was enacted partly in the hope that fewer class actions would survive in federal court.²¹⁸ The replacement theory is thus in some tension with the spirit of CAFA because it provides federal courts with more tools to retain large class actions. Second, CAFA provides for diversity jurisdiction if the total amount in controversy exceeds \$5 million,²¹⁹ whereas prior to CAFA, some federal courts required each class member to satisfy the \$75,000 amount-in-controversy jurisdictional limit.²²⁰ Under the replacement theory, in which the global class is disregarded and the case proceeds with just multiple subclasses, it is unclear whether the CAFA \$5 million jurisdictional limit would apply to the uncertified global class or would be required of each subclass individually. The replacement theory may then cause some confusion in the applicability of CAFA's amount-in-controversy requirement.

These tensions with CAFA may come to a head in the near future, and it is unclear how they will be resolved. My hope is that this article will be a call for further discussion on these issues and, ultimately, clarification by the Rules Committee or the Supreme Court. Until then, I believe that, for better or for worse, the replacement theory is the proper interpretation of Rule 23(c)(4)(B).

²¹⁷ Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.

²¹⁸ See S. REP. NO. 109-14, at (2005) (stating that state court "judges have reputations for readily certifying classes").

²¹⁹ Class Action Fairness Act § 4(d)(2).

²²⁰ See, e.g., *Trimble v. Asarco, Inc.*, 232 F.3d 946 (8th Cir. 2000); *Meritcare, Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214 (3d Cir. 1999); *Leonhardt v. W. Sugar Co.*, 160 F.3d 631 (10th Cir. 1998); see also *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973). But see *Rosmer v. Pfizer, Inc.*, 263 F.3d 110 (4th Cir. 2001) (holding that only the named plaintiff need satisfy the jurisdictional amount); *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248 (11th Cir. 2003) (same); *Gibson v. Chrysler Corp.*, 261 F.3d 927 (9th Cir. 2001) (same); *Stromberg Metal Works Inc. v. Press Mech. Inc.*, 77 F.3d 928 (7th Cir. 1996) (same); *In re Abbott Labs., Inc.*, 51 F.3d 524 (5th Cir. 1995) (same).