

Principles of the Law of Aggregate Litigation
Proposed Final Draft

Motion to Amend Comments to § 2.02

The undersigned moves to amend the comments to § 2.02, and the accompanying Reporters' Notes to §§ 2.02 and 2.03 which reinforce these same principles.

For the reasons set forth below, the following revisions are proposed:

[Proposed Revision to 75:8-11]

The present Section draws upon experience with actual, on-the-ground application of the existing law of class actions so as to frame both the predominance concept and the authorization for issue classes in a more cohesive fashion, but this Section should not be construed to suggest that the predominance concept does not apply fully to such classes.

[Proposed Revision to 89:34-90:3]

The courts are divided over the precise relationship between the predominance requirement of Rule 23(b)(3) and the authorization for issue classes in Rule 23(c)(4), with the majority of courts that have addressed the issue holding that predominance must be satisfied with respect to a claim as a whole before an issues class may be considered. Compare, e.g., *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 n.21 (5th Cir. 1996) (“Reading Rule 23(c)(4) as allowing a court to sever issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case when there is a common issue, a result that could not have been intended.”), with, e.g., *In re Nassau County Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006) (“[A] court may employ Subsection (c)(4) to certify a class as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)’s predominance requirement.”). This division in the courts, in turn, has generated divergent . . .

[Proposed Revision to 90:42-45]

The Superior Court of Justice for Ontario, Canada (a trial court), used much the same formulation to frame the crucial inquiry for certification of common issues. See *Tiboni v. Merck Frosst Canada Ltd.*, [2008] O.J. 2996, at ¶ 100 (concluding that a class-wide “decision on common issues . . . will substantially advance the litigation towards a resolution of the claims of class members”). However, more recently, a Canadian appellate court (the Saskatchewan Court of Appeals) expressly rejected the approach taken in *Tiboni* in the context of the same product liability litigation. See *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43, at ¶ 160 (noting that the sheer diversity in the nature of the claims asserted by the class members “posed an insurmountable challenge to the quest for commonality in relation to the proposed common issues”). That court’s view echoed the conclusions of a U.S. federal court that considered a similar question under Rule 23 in the same product liability controversy. In *re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 461 (E.D. La. 2006) (“Resolution of general causation is unlikely to affect the course of this litigation” because “[l]ittle or no time and expense will be saved in these individual trials by virtue of the preceding mass trial on general causation.”) (citing Roger L. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. Ill. L. Rev. 69, 79). Still, the class certification in *Klay* did not encompass all issues in the underlying litigation. . .

[Proposed Revision to 90:50-91:7]

In most instances, courts have refused to certify proposed “issues classes.” See, e.g., *Arch v. American Tobacco Co.*, 175 F.R.D. 469, 488 (E.D. Pa. 1997) (rejecting issues trial on the question of general causation in tobacco cases); *In re Paxil Litig.*, 212 F.R.D. 539, 546-47

(C.D. Cal. 2003) (collecting cases and rejecting aggregated trial on general causation); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 165 (2d Cir. 1987) (rejecting trial court’s “bold and imaginative” plan to hold separate trial on common questions of law); *Castano*, 84 F.3d at 741, 746 (rejecting proposed class issues trial on “core liability issues” because the aggregation of claims “magnifies and strengthens the number of unmeritorious claims”); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 184 (1995) (reversing class issues trial on general question of negligence, noting “the district court’s commendable desire to experiment with an innovative procedure for streamlining the adjudication of [a] ‘mass tort’” but holding that in practice the issues trial would exceed the “permissible bounds of discretion in the management of federal litigation”). For example, federal courts around the country have considered – and rejected – “general causation” classes in product liability actions because they do not promote efficiency. These courts have recognized that the only truly meaningful causation determination in product liability cases – the individualized determination of whether the product at issue injured a particular individual – cannot be decided in an aggregate proceeding. See *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 220 (E.D. La. 1998) (“proof of ‘general causation’ would not satisfy each class member’s obligation to prove” that an alleged defect caused his or her injuries); *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 265 (S.D. Cal. 1988) (rejecting phased general causation trial). Nonetheless, even courts that appear to require that overall predominance is satisfied before proceeding with issues classes have recognized the propriety of issues classes in particular circumstances. Compare, e.g., *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910 (7th Cir. 2003) (affirming use of issues

class in the case of alleged toxic leak affecting a defined geographic area); with *In re Rhone Poulenc*, 51 F.3d at 1297 (reversing certification of issues class in personal-injury mass tort).

At the same time, Comment *a* cautions that the tendency of aggregate treatment to increase the likelihood of settlement does not, in itself, lend support to the required determination of material advancement.

[Proposed Revision to 110:49-111:2]

The discussion in this Section of the relationship between issues of liability and remedy is not designed to call for amendments to existing rules of civil procedure. As reflected in the Reporters' Notes to § 2.02, judicial decisions have generally rejected proposed issues classes in the product liability and personal injury contexts. No change to existing rules would be necessary for courts to implement this Section.

Rationale for Proposed Amendments

The comments and Reporters' Notes to §§ 2.02 and 2.03 of the proposed final draft of the PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (dated April 1, 2009) state that those sections "contemplate[] neither the abandonment of [Fed. R. Civ. P. 23's] provisions in existing law nor, for that matter, the necessity of rule amendment"; that they "elaborate, in a more systematic fashion, current practices"; that they rely on "existing case law"; and that they identify "emerging" trends in the treatment of issues classes. *See* §§ 2.02-.03, at 74, 89, 91, 110-11. However, a closer examination of the cases cited in the Notes (as well as precedents not cited in that discussion) suggests that the draft in fact argues for what would amount to a

significant change in existing law. The proposed Amendments would address some of these concerns.

I. COURTS HAVE GENERALLY REJECTED THE NOTION THAT THE PREDOMINANCE REQUIREMENT CAN BE AVOIDED THROUGH THE USE OF ISSUES TRIALS.

The comments and Reporters' Notes to §§ 2.02 and 2.03 assert that issues classes are appropriate regardless of whether a claim proposed for class treatment as a whole meets the predominance requirement set forth in Rule 23(b)(3). While the federal circuits are split on this question, the prevailing view among courts that have addressed the question is that certification of issues classes pursuant to Rule 23(c)(4) is *not* an alternative to a finding of predominance under 23(b)(3). Instead, issues classes addressing a single element of plaintiffs' claims are inappropriate unless plaintiffs can establish that common issues predominate as to their claims generally. As the Fifth Circuit put it in *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) – the leading case on the question – a “district court cannot manufacture predominance through the nimble use of [bifurcation],” because “a cause of action, as a whole, must satisfy the predominance requirement of (b)(3).” *Id.* at 745 n.21. In *Castano*, the court reversed class certification despite plaintiffs' proposal that common issues be severed from individual issues.

In explaining its decision, the Fifth Circuit noted:

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.

Id. The majority of courts have agreed, refusing to certify issues classes where a claim, viewed in its totality, involved individualized issues. *See also Blain v. Smithkline Beecham Corp.*, 240

F.R.D. 179, 190 (E.D. Pa. 2007) (“only after the court has found that the cause of action satisfies the predominance requirements of Rule 23(b)(3) may it certify common issues pursuant to Rule 23(c)(4)”); *Taylor v. CSX Transp., Inc.*, No. 3:05 CV 7383, 2007 U.S. Dist. LEXIS 75467, at *42 (N.D. Ohio Sept. 27, 2007) (“Plaintiffs must still satisfy that the issues to be determined by class adjudication predominate over the claims as a whole, including the claims in the separate individual issue trials.”) (internal citation and quotation marks omitted); *Hamilton v. O’Connor Chevrolet, Inc.*, No. 02 C 1897, 2006 U.S. Dist. LEXIS 44149, at *21-22 (N.D. Ill. June 12, 2006) (“a class action movant cannot gerrymander predominance by suggesting that only a single issue be certified for class treatment . . . when other individualized issues will dominate or be meaningfully material to the resolution of the absent class members’ claims”); *Perez v. Metabolife Int’l, Inc.*, 218 F.R.D. 262, 273 (S.D. Fla. 2003) (purportedly common “sub-issues cannot be separated out from those that require individualized treatment unless the common issues in the action as a whole predominate”; Rule 23(b)(3) “cannot be satisfied by seeking to repeatedly split the claims pursuant to Rule 23(c)(4),” when “liability as to Plaintiffs is, overall, a highly individuated issue”) (internal quotation omitted); *Robertson v. Sikorsky Aircraft Corp.*, No. 397CV1216(GLG), 2000 WL 33381019, at *19 (D. Conn. July 5, 2001) (“[a]n action must be considered as a whole in order to determine whether or not the predominance requirement has been satisfied”); *Neely v. Ethicon Inc.*, Nos. 1:00-CV-00569, 1:01-CV-37, 1:01-CV-38, 2001 WL 1090204, at *5 (E.D. Tex. Aug. 15, 2001) (holding that “Rule 23(c)(4)(A) does not operate independently from the rule of predominance found in 23(b)(3)” and refusing to limit its predominance inquiry to “common issues” alone); *Small v. Lorillard Tobacco Co., Inc.*, 679 N.Y.S.2d 593, 601 (App. Div. 1998) (rejecting certification of general liability issues; “[s]uch a

relaxation of the predominance requirement would effectively nullify it: if *any* element of fraud were common to all the individual trials, [the rule] would be deemed satisfied no matter how much individualized proof was needed for the other elements”).

The Notes cite a few cases on both sides of this question. *See* § 2.02, at 89 (citing *Castano; In re Nassau County Strip Search Cases*, 461 F.3d 219 (2d Cir. 2006); and *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996)). But in effect, the Notes acknowledge only the minority view of the issue, characterizing the clear, distinct split in authority as “considerable confusion in the courts.” § 2.02, at 89. Indeed, the Notes go so far as to suggest that there is an “emerging convergence of approach in the case law” around the notion that issues classes are legally sound whenever they will “materially advance the resolution” of any case – language that suggests that the predominance requirement can be overlooked as long as issues class treatment satisfies Rule 23(b)(3)’s superiority requirement. *Id.* at 91.

In support of this claim, the Notes rely primarily on two decisions of the U.S. Court of Appeals for the Seventh Circuit, which do not in fact stand for the broad proposition advanced in the Notes:

In *Mejdrech* [*v. Met-Coil Systems Corp.*, 319 F.3d 910 (7th Cir. 2003)] and *Allen* [*v. International Truck & Engine Corp.*, 358 F.3d 469 (7th Cir. 2004)], the Seventh Circuit overturned¹ for abuse of discretion the refusals of district courts to certify issue classes in environmental contamination and employment discrimination litigation, respectively, even in the face of circuit precedent overturning an issue class certification in mass product-liability litigation. *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995).

¹ The Notes also misstate the holding of *Mejdrech*, which *affirmed* rather than *overturned* the district court (albeit in favor of certification, as the Notes correctly indicate).

§ 2.02, at 91. Read in light of the overall tone of the Notes, the plain implication of this passage is that judicial skepticism of issues classes is outmoded and that the modern trend is a bias toward embracing that procedural device. But that implication is essentially rejected by one of the very cases on which the Notes rely. In *Mejdrech*, the Seventh Circuit affirmed the certification of an issues class in a toxic tort case alleging that a toxic agent had leaked from the defendant's storage tank into the groundwater in a two-mile area around the tank. The class comprised persons living within that area. The Seventh Circuit affirmed the propriety of an issues class to address the factual questions whether the defendant polluted the soil and, if so, the extent of the pollution, leaving for later resolution the individual questions whether each class member lived in a polluted area and, if so, whether they suffered any damages as a result. 319 F.3d at 911-12. Rather than suggesting a move away from *Rhone-Poulenc* – as the Notes imply – the court expressly distinguished that case on two grounds. First, it noted that, unlike *Rhone-Poulenc*, the common factual questions in *Mejdrech* were “not especially complex,” and the consequences of answering those factual questions incorrectly would in any event not prove “catastrophic” for the defendant because the individual plaintiffs would have to prove “the fact and extent of their individual injuries.” Second, it noted that because the claims were all subject to one state's laws – as all parties were located within two miles of a particular geographic location – “determination of class-wide issues would [not] require the judge to create a composite legal standard that is the positive law of no jurisdiction.” *Id.*

Mejdrech did not make new law or evince any new trend. Nor did it address the question whether common issues predominated under Rule 23(b)(3). Had it done so, however, it likely would have reached the unremarkable proposition – recognized in cases dating back several

decades – that common issues can predominate in mass-tort class actions “arising out of a single disaster or a single course of conduct.” *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 & n.10 (6th Cir. 1988) (collecting authority dating back to 1973). These same cases, while perhaps not addressing the problem under the rubric of an “issues class,” likewise recognized that individual issues might need to be addressed individually, after resolution of common (and predominating) issues. *See, e.g., id.* at 1197 (affirming class treatment but nonetheless recognizing that “individual members of the class still will be required to submit evidence concerning their particularized damage claims in subsequent proceedings”).

Allen likewise neither made new law nor departed from *Rhone-Poulenc*. Indeed, *Allen* was an employment-discrimination action seeking equitable relief under **Rule 23(b)(2)** and thus did not make any law pertaining to Rule 23(b)(3)’s predominance requirement whatsoever. 358 F.3d at 471. Not surprisingly, *Allen* did not even cite *Rhone-Poulenc*. In any event, *Allen*, like *Mejdrech*, effectively held that class issues predominated in that case, explaining that the relief requested was injunctive in nature and thus not susceptible to individualized application. *Id.* (“The need for, if not inevitability of, class-wide treatment when injunctive relief is at stake is what Rule 23(b)(2) is about.”). And its authorization of bifurcated treatment of the requested equitable and legal remedies in that case was not part of any new trend in issues classes but the practical effect of “the statutory authorization in 1991 of damages recoveries for employees in Title VII cases,” which “complicated what used to be an almost automatic class certification in pattern-or-practice cases.” *Id.* at 470.

In short, the cases on which the Notes rely do support the narrow proposition that issues classes are sometimes appropriate. But they do not support the Notes’ declaration that there is an

“emerging convergence of approach in the case law” in support of broader use of issues classes than has previously been recognized as appropriate under Rule 23. For similar reasons, the references to the “emerging direction of the law” and “the emerging case law” in the final paragraph of the Notes to § 2.03 seem to overreach. The proposed Amendment would thus revise the Notes paragraph beginning at page 90, line 50 and ending page 91, line 7, as well as the paragraph beginning at page 110, line 49 and ending page 111, line 2 as indicated in the Amendment. It would also revise Comment *a* beginning on page 75, line 8 and ending line 11, to reflect that the predominance requirement should not be adversely impaired through the use of common issue classes.

II. THE MAJORITY OF COURTS HAVE REJECTED ISSUES CLASSES BECAUSE THEY DO NOT WORK AS A PRACTICAL MATTER.

The comments and Reporters’ Notes to §§ 2.03 and 2.03 also do not properly emphasize the fact that during the over forty years in which issues classes have been authorized by the Federal Rules of Civil Procedure, the overwhelming majority of courts that have addressed proposals to certify issues classes have refused to do so, especially in the product liability and personal injury contexts. *See, e.g., Arch v. American Tobacco Co.*, 175 F.R.D. 469, 488 (E.D. Pa. 1997) (rejecting issues trial on the question of general causation in tobacco cases); *In re Paxil Litig.*, 212 F.R.D. 539, 546-47 (C.D. Cal. 2003) (collecting cases and rejecting aggregated trial on general causation); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 165 (2d Cir. 1987) (rejecting trial court’s “bold and imaginative” plan to hold separate trial on common questions of law); *Castano*, 84 F.3d at 741, 746 (rejecting proposed class issues trial on “core liability issues” because the aggregation of claims “magnifies and strengthens the number of unmeritorious claims”); *In re Rhone-Poulenc*, 51 F.3d at 1297 (reversing class issues trial on general question

of negligence, noting “the district court’s commendable desire to experiment with an innovative procedure for streamlining the adjudication of [a] ‘mass tort’” but holding that in practice the issues trial would exceed the “permissible bounds of discretion in the management of federal litigation”).

For example, federal courts around the country have considered – and rejected – “general causation” classes in product liability actions because they do not promote efficiency in any meaningful way. This is because the only causation determination that is truly meaningful in product liability cases – the individualized determination of whether the product at issue caused injury to a particular plaintiff – cannot be decided in an aggregate proceeding. *See In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 220 (E.D. La. 1998) (finding that “proof of ‘general causation’ would not satisfy each class member’s obligation to prove” that an alleged defect caused his or her injuries); *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 265 (S.D. Cal. 1988) (rejecting phased general causation trial).

Thus, while an issues trial on general causation might allow plaintiffs to obtain a headline-worthy verdict that a particular product is *capable* of causing injury, such a verdict would do nothing to advance the litigation as a whole. As one court explained, because general causation is necessarily tied to the individual circumstances of each plaintiff’s exposure and injury, the allegedly “common” question of “general causation” can be fabricated “only by lifting the description of the claims to a level of generality that tears them from their substantively required moorings to actual causation and discrete injury.” *In re Methyl Tertiary Butyl Ether (“MTBE”) Prods. Liab. Litig.*, 209 F.R.D. 323, 352 (S.D.N.Y. 2002). Thus, a general verdict on causation unconnected to the facts of any one plaintiff’s case will not resolve the most critical

causation issue in most cases: whether each plaintiff's alleged injury was actually caused by the defendant's conduct.

Courts have also recognized that issues classes addressing allegedly "common" questions (such as general causation) are problematic because subsequent juries addressing individual plaintiffs' claims would inevitably reconsider these "common" liability issues, in violation of the Re-examination Clause of the Seventh Amendment. Under the Re-examination Clause, "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." In *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), the Supreme Court interpreted this Clause to prohibit a jury from passing on the same facts necessarily determined by a prior jury. *Id.* at 500. Subsequent courts have repeatedly relied on *Gasoline Products* to reject issues trials in cases where any facts decided by the first jury in the first phase of the trial could possibly be reconsidered by the second jury in the second phase of the trial. *See Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978) (observing that bifurcation of fact issues is "not the usual course that should be followed") (citing *Gasoline Prods. Co.*); *Bacon v. Honda of Am. Mfg.*, 205 F.R.D. 466, 489 (S.D. Ohio 2001) (rejecting plaintiffs' proposal to bifurcate because the two stages "are not so distinct and separable from one another that they may be considered separately by multiple fact-finders without violating the Seventh Amendment") (quoting *Gasoline Prods. Co.*, 283 U.S. at 500). For example, in *Rhone-Poulenc*, the Seventh Circuit reversed the district court's bifurcation order because the first jury would have merely determined "whether one or more of the defendants was negligent under one of the two theories," leaving for a second phase "such issues as comparative negligence . . . and proximate causation," which would have inevitably required

the second jury to revisit the findings of the first jury. 51 F.3d at 1303. Similarly, in *Castano*, the court refused to certify a general causation issues class, holding that “[a]t a bare minimum, a second jury will rehear evidence of the defendant’s conduct,” and “the second jury could reevaluate the defendant’s fault, determine that the defendant was not at fault, and apportion 100% of the fault to the plaintiff.” 84 F.3d at 751 (noting that “risk of such reevaluation is so great that class treatment can hardly be said to be superior to individual adjudication”).

The current draft of the Reporters’ Notes fails to focus on this long line of cases refusing to certify issues classes, while highlighting a small number of outlier cases (including some decisions by non-U.S. courts applying non-U.S. procedural law) that have approved such classes. For example, the current draft cites *Tiboni v. Merck-Frosst Canada Ltd.* [2008] O.J. 2992, at ¶ 100 – a ruling from a Canadian trial court approving, pursuant to Canadian legal precedent, an issues class addressing the “general causation” element of personal injury claims alleged by users of the prescription drug Vioxx. But the draft fails to note that Judge Eldon Fallon, a respected jurist who has been overseeing the federal Vioxx multi-district litigation in the United States for over four years, expressly rejected a “general causation” issues class under the relevant, American class action standard – Rule 23(b)(3). According to Judge Fallon, plaintiffs “cannot construct predominance through the creative use of bifurcation because a cause of action, as a whole, must satisfy the predominance requirement of (b)(3).” *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 461 (E.D. La. 2006) (internal citation and quotation omitted). Judge Fallon also noted that “[r]esolution of general causation is unlikely to affect the course of this litigation,” citing a commentator for the proposition that “[l]ittle or no time and expense will be saved in these individual trials by virtue of the preceding mass trial on general causation.” *Id.*

(citing Roger L. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. Ill. L. Rev. 69, 79). The Notes also fail to acknowledge a more recent ruling from another Canadian court (the Saskatchewan Court of Appeals), *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 (March 30, 2009), in which the Court flatly rejected the approach taken in *Tiboni*. *See id.* at ¶ 160 (noting that the sheer diversity in the nature of the claims asserted by the class members “posed an insurmountable challenge to the quest for commonality in relation to the proposed common issues”).² Thus, in their present form, the Notes rely on a Canadian *trial* court decision, giving no attention to the fact that a Canadian *appellate* court and, more importantly, a U.S. federal court emphatically rejected the issues class approach taken by the Canadian trial court in the same product liability controversy.

John Beisner

² Obviously, this ruling was issued too late for inclusion in the April 1 draft, but its existence should not be ignored in the final document.