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Civil Procedure: Class Certification and the Predominance Requirement under Oklahoma Section 2023(B)(3)

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CIVIL PROCEDURE: CLASS CERTIFICATION AND THE PREDOMINANCE REQUIREMENT UNDER OKLAHOMA SECTION 2023(B)(3)

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I. Introduction

Title 12, section 2023(B)(3) of the Oklahoma Statutes authorizes trial courts to certify class actions in cases where the predominant questions of fact or law to be litigated are common to the class members and class adjudication is superior to the available alternatives.[1] While the section 2023(B)(3) class action emphasizes the cohesiveness and sameness of the class members, its primary goal is not consistency or uniformity, but rather judicial economy and efficiency.[2] It uses representative adjudication to relieve courts and parties from having to litigate the same issues repeatedly and provides a cost-effective way of affording justice when defendants systematically cause a small amount of harm to a large number of people.[3]

This Article examines how Oklahoma courts are interpreting and applying the predominance requirement for certifying section 2023(B)(3) class actions. Admittedly, the topic is both too narrow and too broad. It is too narrow in the sense that the various class certification standards — from the section 2023(A) prerequisites to the section 2023(B)(3) superiority requirement — overlap with predominance at several points; thus, examining predominance as a discrete topic suffers from a certain degree of inherent artificiality.[4] On

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1. 12 OKLA. STAT. § 2023(B)(3) (2001).

2. *See* 5 JEROLD S. SOLOVY ET AL., MOORE'S FEDERAL PRACTICE § 23.44 (3d ed. 2002) [hereinafter MOORE'S FEDERAL PRACTICE] (discussing categories of class actions under Federal Rule of Civil Procedure 23); *see also infra* notes 20-26 and accompanying text.

3. *See* 2 ALBERT CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 4:24, at 155 (4th ed. 2002) ("Rule 23(b)(3) was designed to permit a class action when judicial economies could be achieved."); *see also* Mattoon v. City of Norman, 1981 OK 92, ¶ 9, 633 P.2d 735, 737 (stating that class actions were originally designed to provide redress for small value claims, but later expanded to provide means of efficiently resolving large numbers of overlapping claims).

4. Anyone wishing to comprehensively understand section 2023 will want to note the larger body of recent decisions exploring class action practice in Oklahoma. *See, e.g.*, Scoufos v. State Farm Fire & Cas., 2001 OK 113, ¶ 11, 41 P.3d 366, 370 (addressing prerequisite of typicality); Fent v. Okla. Natural Gas Co., 2001 OK 35, ¶ 15, 27 P.3d 477, 481-82 (same). Also, many of the cases I discuss for their (B)(3) certification significance speak importantly to

the other hand, an Article that purports to canvass the predominance requirement is simultaneously too ambitious in its breadth; the predominance requirement subsumes a wealth of issues that can vary significantly depending on the subject matter underlying the putative class action.[5] Thus, I offer this Article not as a comprehensive survey but as a selective and focused analysis of a few of the more prominent issues emerging from the predominance requirement. In so doing, my purpose is not to pass judgment on those developments, but rather to identify them and to explore how they might impact the future of section 2023(B)(3) class actions in Oklahoma.

To that end, this Article proceeds in six parts. Part II provides a brief background on class actions, paying particular attention to the evolution of class actions under Oklahoma state court procedure. Part III considers the relationship between choice of law and the predominance requirement, a topic that has become integral to a court's ability — and willingness — to certify national state law class actions. Part IV then looks at how Oklahoma courts are deciding challenges to predominance based on the presence of individual issues. Here, I focus on two particular types of individual issues — transactional variance and the need to prove individual reliance for fraud and similar claims. Part V turns to the methodology that Oklahoma courts have developed for determining whether common issues predominate over individual issues. Important factors in this regard include how the trial court may consider the merits at the certification stage, whether the trial court must devise a plan for resolving individual issues prior to granting certification, and the use of subclasses and issue classes to resolve problems of individual issues. Part VI concludes with a few observations regarding the cumulative effect of Oklahoma's approach to predominance and the significance of that effect for Oklahoma's place in the national market for state law class actions.

II. Class Action Background

The class action is a procedural device that allows a representative plaintiff to sue on behalf of himself and others who are similarly situated.[6] Class actions serve several purposes. First, class actions promote economy and

other class action issues. *See, e.g.*, Ysbrand v. DaimlerChrysler Corp., 2003 OK 17, ¶¶ 28-32, No. 97,469, 2003 WL 437160, at *7-*8 (Feb. 25, 2003) (addressing prerequisite of representativeness); KMC Leasing, Inc. v. Rockwell-Standard Corp., 2000 OK 51, ¶¶ 15-18, 28-30, 9 P.3d 683, 691-92 (addressing prerequisites of numerosity and typicality).

5. As of this date, the published Oklahoma class action decisions primarily relate to business and consumer disputes. Accordingly, this Article emphasizes those areas in its discussion of section 2023(B)(3), particularly in Part IV, which deals with the impact of individual issues on predominance.

6. 1 CONTE & NEWBERG, *supra* note 3, § 1:1.

efficiency "by obviating the need for multiple adjudications of the same issues."[7] Second, class actions promote consistency by ensuring that similarly situated plaintiffs are treated alike, and by ensuring that defendants are not subject to conflicting orders.[8] Third, class actions promote justice by affording a viable remedy for plaintiffs with small individual claims who otherwise could not economically pursue their rights.[9]

In Oklahoma, class actions are governed by title 12, section 2023 of the Oklahoma Statutes.[10] Section 2023 is modeled after Federal Rule of Civil Procedure 23,[11] the only significant current[12] difference being that section

7. 5 MOORE'S FEDERAL PRACTICE, *supra* note 2, § 23.02; *see also* Gen. Tel. Co. v. Falcon, 457 U.S. 147, 155 (1982) ("'[T]he class action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion . . . .'") (alteration in original) (quoting Califano v. Yamasaki, 442 U.S. 682, 701 (1979)).

8. *See* 5 MOORE'S FEDERAL PRACTICE, *supra* note 2, § 23.02.

9. *See id.*; *see also* 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."); *Ysbrand*, ¶ 6, 2003 WL 437160, at *2 ("The [class action device] permits plaintiffs to 'vindicat[e] the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost.") (alteration in original) (quoting Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338 (1980)).

10. The Oklahoma legislature adopted section 2023 in 1984 as part of the Oklahoma Pleading Code. *See generally* Charles W. Adams, *Highlights of Changes Made by the Oklahoma Pleading Code*, 55 OKLA. B.J. 1875, 1876 (1984). Section 2023 superseded two prior Oklahoma class action rules. Oklahoma's first class action rule — commonly referred to as "section 233" — was based on the Field Code. *See* George B. Fraser, *Kinds of Class Action Cases*, 7 OKLA. CITY U. L. REV. 1, 22 (1982) (discussing former rule). In 1978, Oklahoma enacted another class action statute modeled after New York's class action statute. *Id.* at 26. The operative provision was title 12, section 13A, which effectively merged the current section 2023(A) prerequisites and the current section 2023(B)(3) predominance and superiority requirements such that *all class actions* brought under 13A had to demonstrate predominance and superiority, even those class actions that today would proceed under current section 2023(B)(1) or (B)(2). *See id.*; Allen Wayne Campbell, Annual Survey of Oklahoma Law, *Pleading and Procedure*, 6 OKLA. CITY U. L. REV. 751, 754 (1981) (discussing former section 13A). Significantly, the 1978 class action rule also required class members to "opt in" to the class, in contrast to current section 2023(B)(3), which binds class members to the class judgment unless they "opt out." *See* Adams, *supra*, at 1876; Fraser, *supra*, at 27.

11. FED. R. CIV. P. 23.

12. On March 27, 2003, the United States Supreme Court submitted proposed amendments to Federal Rule of Civil Procedure 23. *See* Amendments Transmitted to Congress (Mar. 2003), http://www.uscourts.gov/rules/congress0303.html (last visited Sept. 10, 2003). The amendments, which will take effect December 1, 2003, absent contrary congressional action, include significant new requirements relating to class action settlement and the appointment and compensation of class counsel. *See* FED. R. CIV. P. 23 (Proposed 2003), *available at* http://www.uscourts.gov/rules/congress0303.html.

2023 contains an additional provision dealing with the notice that class representatives must provide to absent class members.[13] Accordingly, Oklahoma courts may look to Federal Rule of Civil Procedure 23 and the decisions interpreting it for guidance.[14]

Under section 2023, a judge must certify the case as a class action before the representative plaintiff may litigate on behalf of the class.[15] The certification process has two steps. First, the putative class representative must show that a sufficiently defined and cohesive class of plaintiffs exists. The putative class representative does this by showing that the class meets the section 2023(A) "prerequisites" to a class action: numerosity, commonality, typicality, and representativeness.[16] Second, a putative class representative

13. *See* 12 OKLA. STAT. ANN. § 2023 & comm. cmt. (West 1993). In addition, Federal Rule of Civil Procedure 23 was amended in 1998 to add a provision allowing for interlocutory appeal of class certification rulings. *See* FED. R. CIV. P. 23(f) advisory committee's note (1998). While Oklahoma also allows for interlocutory appeal of class certification rulings, that provision is located at title 12, section 993(A)(6) of the Oklahoma Statutes. 12 OKLA. STAT. § 993(A)(6) (2001).

14. The Committee Comment to section 2023 expressly states: "In construing Section 2023 Oklahoma courts should consult the Advisory Notes to the 1966 amendments to Federal Rule of Civil Procedure 23." 12 OKLA. STAT. ANN. § 2023 comm. cmt. (West 1993). In addition, the Oklahoma Supreme Court has stated that "[s]ince Oklahoma's class action scheme closely parallels that provided in the Federal Rules of Civil Procedure, we may look to federal authority for guidance regarding its rationale." KMC Leasing, Inc. v. Rockwell-Standard Corp., 2000 OK 51, ¶ 9, 9 P.3d 683, 688 (citing Shores v. First City Bank Corp., 1984 OK 67, ¶ 5, 689 P.2d 299, 301). Oklahoma courts have sought guidance from federal class action decisions since 1978, when Oklahoma first adopted a class action rule that paralleled federal class action practice under the modern (post 1966) version of Federal Rule of Civil Procedure 23. *See* Perry v. Meek, 1980 OK 151, ¶ 19, 618 P.2d 934, 940 ("The Federal Rule 23(a) class action prerequisites closely track the class action prerequisites given in [title 12, section 13 of the Oklahoma Statutes]. Insofar as the issues under consideration arise from provisions of title 12, sections 13 through 18, which are actually similar to the provisions of Federal Rule of Civil Procedure 23, the federal case law on those points is instructive persuasive authority in this forum.").

15. 12 OKLA. STAT. § 2023 (2001). The certification process helps ensure that the class action ultimately yields a judgment binding on the class members. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1997) ("Subdivisions (a) and (b) focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives."). Absent class members are bound by the judgment only "where they are in fact adequately represented by parties who are present." Hansberry v. Lee, 311 U.S. 32, 43 (1940). For a discussion of the ability of absent class members to collaterally attack class judgements based on the adequacy of representation, see Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383, 384 (2000).

16. 12 OKLA. STAT. § 2023(A) (2001). The class must also be ascertainable based on objective characteristics that are not dependent on the outcome of the suit. *See* 5 MOORE'S FEDERAL PRACTICE, *supra* note 2, § 23.21[4]; *see also, e.g.*, Intratex Gas Co. v. Beeson, 22

who satisfies the prerequisites must show that the lawsuit he proposes to bring fits within one of three categories of cases in which class actions are deemed maintainable: (1) where separate suits by the individual class members would create a risk that the defendant would become subject to inconsistent obligations, or that the outcomes of certain class members' suits would substantially impair the rights of the other class members; (2) where the suit is principally to obtain injunctive or declaratory relief; or (3) where the class members' common issues predominate over their individual issues and class treatment would be superior to other methods of adjudication.[17] This Article focuses on the last category — the so-called "(b)(3)" class action.[18] More specifically, it focuses on the predominance requirement under section 2023(B)(3) — that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members."[19]

The purpose of the predominance requirement is to ensure that proceeding as a (b)(3) class action in fact will promote judicial economy and efficiency.[20]

S.W.3d 398, 402-03 (Tex. 2000) (finding that the class of persons "whose natural gas was taken by the defendant in quantities less than their ratable proportions" impermissibly defined the class per ultimate liability issue).

17. 12 OKLA. STAT. § 2023(B) (2001).

18. In this Article, I use the term "(b)(3)" to generically refer to class actions brought under the type of predominance and superiority criteria found in section 2023, the parallel Federal Rule of Civil Procedure 23, and other similar state rules governing class actions. *See, e.g.*, TEX. R. CIV. P. 42(b)(4) (authorizing class certification under predominance and superiority standards). *See generally* 4 CONTE & NEWBERG, *supra* note 3, § 13.1.

19. 12 OKLA. STAT. § 2023(B)(3) (2001). This Article does not specifically address the additional requirement that class treatment be superior to alternative forms of adjudication. *See, e.g.*, Ysbrand v. DaimlerChrysler Corp., 2003 OK 17, ¶¶ 24-25, No. 97,469, 2003 WL 437160, at *6 (Feb. 25, 2003) (concluding that class action was superior to separate suits by individual minivan owners). Overlap certainly exists; the manageability of the proposed class actions is one of the primary considerations for finding superiority, and the presence of large numbers of individual issues can cause significant management problems. *See* Sias v. Edge Communications, Inc., 2000 OK CIV APP 72, ¶ 10, 8 P.3d 182, 185 ("The difficulty in managing a class action is a factor to be considered in determining whether a class action is the superior method of adjudication."). As one leading treatise explains, "When a court determines that common questions do not predominate over individual ones . . . the court is highly likely to find that a class action is also not superior because of the management difficulties posed by the individual questions." 2 CONTE & NEWBERG, *supra* note 3, § 4:32, at 283; *see also* 5 MOORE'S FEDERAL PRACTICE, *supra* note 2, § 23.49[5][b]. Superiority, however, also looks to factors that do not overlap with predominance, such as the interest individual class members might have in controlling their own suits, overlap with pending litigation, and the appropriateness of the particular forum for consolidated litigation. *See* FED. R. CIV. P. 23(b)(3); 12 OKLA. STAT. § 2023(B)(3) (2001). For a more extended discussion of the superiority requirement, see 2 CONTE & NEWBERG, *supra* note 3, §§ 4:27-4:32.

20. *See* FED. R. CIV. P. 23 advisory committee's note (1966) ("Subdivision (b)(3)

It is not always clear how a court is to determine this, however, since the rule does not define predominance[21] and the courts have not articulated a single precise standard for measuring predominance.[22] Courts universally reject a numerical test in the sense that predominance is not determined by comparing the sheer number of common issues with the number of individual issues.[23] It also cannot be measured by simply comparing how much trial time would be needed for common issues versus individual issues.[24] Rather, courts view predominance as a qualitative analysis that focuses on the overall significance

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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."); 2 CONTE & NEWBERG, *supra* note 3, § 4:25, at 156. The predominance requirement may serve the additional purpose of "test[ing] whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Prods., Inc., v. Windsor, 521 U.S. 591, 623 (1997). *But see* John Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 400-02 (2000) (arguing that predominance cannot be understood as a function of class cohesion).

21. *See* 7A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1778, at 522-26 (2d ed. 1986) ("Exactly what is meant by 'predominate' is not made clear in the rule . . . ."). Rule 23(b)(3), both in its federal and Oklahoma forms, does add the following:

> The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions, (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class, (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and (d) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(b)(3); 12 OKLA. STAT. § 2023(B)(3) (2001). While these factors technically apply to both predominance and superiority, they are most commonly viewed as speaking to the issue of superiority. *See* 2 CONTE & NEWBERG, *supra* note 3, § 4:28; *see also* 7A WRIGHT ET AL., *supra*, § 1777, at 519-20 ("To aid the court in determining whether class action treatment would be superior, subdivision (b)(3) lists four factors that the court should consider . . . .") (citation omitted).

22. 5 MOORE'S FEDERAL PRACTICE, *supra* note 2, § 23.46[1] (listing various standards courts have employed). Oftentimes, statements about predominance seem to beg the question being asked. *See, e.g.*, KMC Leasing, Inc. v. Rockwell-Standard Corp., 2000 OK 51, ¶ 19, 9 P.3d 683, 690 ("Where a litany of individual issues is presented, the crucial element of the test is whether those very questions preclude the common from being predominant.").

23. *See KMC Leasing*, ¶ 19, 9 P.3d at 690 (finding that predominance is not quantitative); *see also* 2 CONTE & NEWBERG, *supra* note 3, § 4.25, at 172 ("[P]redominance requirement is not a numerical test.").

24. *See* 2 CONTE & NEWBERG, *supra* note 3, § 4:25, at 171. This type of "clockwatching" is not a helpful measurement because it ignores all of the time saved by not having to litigate the common issue over and over. *See* 7A WRIGHT ET AL., *supra* note 21, §1778, at 527. Indeed, if anything, the "clockwatching" approach penalizes the judicial economy of class adjudication of the common issue.

and weight of the common issues relative to the individual issues.[25] While this conceptualization is certainly more meaningful than counting issues or trial hours, it also is more subjective and less predictable.[26]

III. Predominance and Choice of Law

Choice-of-law principles play a crucial role in the certification of (b)(3) class actions, particularly when the class consists of persons living in many different states.[27] Numerous federal and state courts have held that common issues do not predominate over individual issues when the laws of multiple states will apply to different class members.[28] This view grows out of the belief that, if the laws of different states will apply to the claims of the various class members, then variations in the different states' laws "may swamp any common issues and defeat predominance."[29] Thus, a plaintiff who must prosecute his class action under the laws of multiple states faces a difficult —

25. *See KMC Leasing*, ¶ 19, 9 P.3d at 690; Mattoon v. City of Norman, 1981 OK 92, ¶ 18, 633 P.2d 735, 739 ("Predominance is a qualitative rather than quantitative matter because weight of issues may outweigh their number."); *see also* Moore v. PaineWebber, Inc., 306 F.3d 1247, 1252 (2d Cir. 2002) ("Class-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof.").

26. *See* 2 CONTE & NEWBERG, *supra* note 3, § 4.25, at 172-73 (criticizing comparison of the relative importance of common versus individual issues as subjective and unpredictable).

27. *See* Rory Ryan, Note, *Uncertifiable?: The Current Status of Nationwide State-Law Class Actions*, 54 BAYLOR L. REV. 467, 474 (2002) ("[C]hoice-of-law inquiry will ordinarily make or break certification."); *see also* Paul W. Sugarman et al., *Choice-of-Law Analysis May Stem Class Actions: Class Certifications Often Turn on Inconsistencies in the Applicable Law*, NAT'L L.J., Sept. 16, 2002, at B11 ("A pivotal issue in deciding whether to certify [national class actions] is whether the court can and should apply the laws of a single jurisdiction to all members of the class, or whether class members' claims must be governed by the laws of their home states.").

28. According to one recent decision, "[s]tate and federal courts have overwhelmingly rejected class certification when multiple states' laws must be applied." Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 698-99 (Tex. 2002) (citations omitted) (collecting federal and state cases). Indeed, the Seventh Circuit recently went so far as to say that "[n]o class action is proper unless all litigants are governed by the same legal rules." *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1015 (7th Cir. 2002). For additional case references, see Ryan, *supra* note 27, at 470-71 (listing federal and state cases).

29. Castano v. Am. Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996). As the Sixth Circuit explained, "If more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law . . . ." *In re* Am. Med. Sys., 75 F.3d 1069, 1085 (6th Cir. 1996).

though not impossible — task of persuading the court that the resulting class action would be manageable.[30]

Decisions from Oklahoma courts demonstrate the importance of choice of law for class certification. When Oklahoma courts have concluded that they would be obligated to apply the laws of different states to different class members, they have consistently found that common issues did not predominate and have denied class certification.[31] On the other hand,

30. Some courts have granted class certification even when the laws of all fifty states will apply by finding that the different states' laws can be "grouped" into a manageable handful of categories and then subclassed under Rule 23(c)(4)(B). *See, e.g., In re* St. Jude Med., Inc. Silzone Heart Valves Prods. Liab. Litig., No. MDL 01-1396 JRT/FLN, 2003 WL 1589527, at *10 (D. Minn. Mar. 27, 2003) (creating subclasses based on states with similar laws); *In re* Telectronics Pacing Sys., Inc., 172 F.R.D. 271, 294 (S.D. Ohio 1997) (finding that subclasses adequately accounted for the relevant differences in state law); *see also* Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157, 219-23 (1998) (expressing view that tort laws are sufficiently similar to allow groupings); Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 583 (1996) (suggesting that, in practice, there will usually only be three or four formulations for any legal principle); Ryan Patrick Phair, Comment, *Resolving the "Choice-of-Law Problem" in Rule 23(b)(3) Nationwide Class Actions*, 67 U. CHI. L. REV. 835, 854-56 (2000) (advocating use of grouping and subclassing to deal with state law variation). Other courts, however, have been skeptical that state laws can be grouped in a way that preserves the subtle but important differences in the laws of the various states. *See, e.g., In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995) (rejecting groupings approach because even if state laws differed only in nuance, that "nuance can be important"); *In re* Paxil Litig., 212 F.R.D. 539, 545 (C.D. Cal. 2003) (rejecting proposed groupings as failing to deal adequately with material differences in state laws); Adams v. Kansas City Life Ins. Co., 192 F.R.D. 274, 278 (W.D. Mo. 2000) (finding that plaintiff's state law tables failed to address divergent elements of various state laws); *In re* Ford Motor Co. Ignition Switch Prods. Liab. Litig., 174 F.R.D. 332, 350 (D.N.J. 1997) (finding that plaintiffs failed to demonstrate that state laws could be grouped sufficiently to warrant class certification); Tracker Marine, L.P. v. Ogle, 108 S.W.3d 349, 360 (Tex. App. 2003) (rejecting use of subgroups because "it is unlikely any lawyer or judge could grasp the shades and nuances of so many laws"); *see also* Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 65 (1986) (describing solution of grouping apparently similar laws as tempting but one that creates enormous pressure on judges to compromise important differences in the laws of the various states). I discuss the practical impact of subclassing by law groupings *infra* Part V.

31. *See* Ysbrand v. DaimlerChrysler Corp., 2003 OK 17, ¶ 18, No. 97,469, 2003 WL 437160, at * 5 (Feb. 25, 2003) ("Applying the law of 51 jurisdictions to the fraud claim presents an overwhelming burden which would make the class unmanageable and a class action determination of that claim inappropriate."); KMC Leasing, Inc. v. Rockwell-Standard Corp., 2000 OK 51, ¶ 26, 9 P.3d 683, 691 ("Proof regarding liability and damages will require the trial court to analyze fraud issues under differing laws of numerous jurisdictions. Thus, individuality of issues will predominate . . . ."); Conatzer v. Am. Mercury Ins. Co., 2000 OK CIV APP 141, ¶¶ 25-27, 15 P.3d 1252, 1258 (affirming denial of class certification in part because the claims of the class members might be governed by different states' laws); Sias v. Edge

Oklahoma courts have also rejected predominance and superiority objections after finding that, under Oklahoma conflict principles, a single state's law would govern all claims.[32]

The Oklahoma Supreme Court's most recent section 2023(B)(3) class action case, *Ysbrand v. DaimlerChrysler Corp.*, vividly illustrates the impact of choice of law on class certification.[33] The plaintiffs in *Ysbrand* sought to certify a nationwide class action consisting of all persons in the United States who had purchased a 1996-97 model year Chrysler, Dodge, or Plymouth minivan.[34] The principal class claims were that the front passenger-seat air bags in these minivans were defective, and that DaimlerChrysler withheld information regarding the air bags' defects from minivan purchasers.[35] The putative class complaint asserted claims for breach of express warranty, breach of implied warranty of merchantability, breach of implied warranty of fitness, and fraud.[36] The Sequoyah County District Court certified the class as to all of these claims after finding that the substantive law of Michigan — DaimlerChrysler's principal place of business — would apply to all of the claims of all of the class members.[37]

On appeal, one of DaimlerChrysler's principal arguments was that common issues could not predominate because the laws of different states would apply to different class members.[38] The Oklahoma Supreme Court began its analysis with the breach of warranty claims. The court first reaffirmed that Oklahoma

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Communications, Inc., 2000 OK CIV APP 72, ¶¶ 19-20, 8 P.3d 182, 189 (same); Bunch v. KMart Corp., 1995 OK CIV APP 41, ¶¶ 7-9, 898 P.2d 170, 172 (reversing class certification in part because the claims of the class members would be governed by different states' laws).

32. *See Ysbrand*, ¶ 16, 2003 WL 437160, at *4 (affirming class certification of warranty claims after finding that Michigan law governed all class members' warranty claims); Lobo Exploration Co. v. Amoco Prod. Co., 1999 OK CIV APP 112, ¶ 13, 991 P.2d 1048, 1054 (affirming class certification after finding that the defendant had failed to show that any law other than Oklahoma law would apply to any class member).

33. As of September 7, 2003, the Oklahoma Supreme Court had not released *Ysbrand* for publication in the permanent law reports. Thus, it is still subject to revision or withdrawal. *See Ysbrand*, 2003 OK 17, 2003 WL 437160. The Appellant's Petition for Rehearing, filed March 18, 2003, is also still pending. The court docket for *Ysbrand* is available online at the Oklahoma State Courts Network at http://www.oscn.net.

34. *Ysbrand*, ¶ 4, 2003 WL 437160, at *1. There were several exclusions from the class, most notably all persons who had suffered personal injury as a result of the actual deployment of the minivan's air bag. *Id.* ¶ 4, 2003 WL 437160, at *2. Even with the exclusions, the estimated class size exceeded one million. *Id.* ¶ 2, 2003 WL 437160, at *1.

35. *Id.* ¶ 3, 2003 WL 437160, at *1.

36. *Id.* ¶ 2, 2003 WL 437160, at *1.

37. *Id.* ¶¶ 9-11, 2003 WL 437160, at *3.

38. *Id.* ¶ 8, 2003 WL 437160, at *2.

follows the "most significant relationship" test developed in the Restatement (Second) of Conflicts.[39] The court then acknowledged that, in cases involving the sale of goods, the Second Restatement presumptively chooses the law of the place of delivery as having the most significant relationship to the suit.[40] Nevertheless, presumptions under the Second Restatement are rebuttable upon a finding that another state has a more significant relationship as determined by the overarching choice of law principles set forth in section 6 of the Second Restatement.[41] In *Ysbrand*, the court invoked the section 6 principles to rebut the presumption running to the place of delivery and instead found that Michigan was the state with the most significant relationship.[42] Thus, Michigan warranty law would apply to all of the class warranty claims, regardless of where the buyer-class member lived.[43] Having found that only one set of laws would apply to the warranty claims, the court rejected the argument that the need to apply multiple laws would preclude class certification of the warranty claims.[44]

The court then turned to the class claims for fraud and misrepresentation. Here, the court found that Second Restatement principles presumptively selected the law of each class member's domicile because that is where, through the purchase of a minivan, the class members relied on DaimlerChrysler's alleged misrepresentations.[45] As the court correctly noted, in cases involving pecuniary damages for false representations, section 148 of the Second Restatement provides that the local law of the state where the buyer relied applies "unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in [section] 6."[46] In other words, section 148 employs standard Second Restatement

39. *Id.* ¶ 12, 2003 WL 437160, at *3.

40. *Id.* ¶ 13, 2003 WL 437160, at *3-*4 (discussing RESTATEMENT (SECOND) OF CONFLICTS § 191 (1971)).

41. *See* RESTATEMENT (SECOND) OF CONFLICTS § 6 (1971). For a discussion of the Second Restatement's use of rebuttable presumptions, see EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 2.14, at 62 (3d ed. 2000).

42. *Ysbrand*, ¶ 16, 2003 WL 437160, at *4. The court concluded that the buyer's home state had a diminished interest, even though it would be the place of contracting, performance, and delivery, because car buyers do not negotiate automobile warranties. *Id.* ¶ 15, 2003 WL 437160, at *4. On the other hand, it concluded that Michigan had a strong interest in applying its own warranty law, because it was the place where the minivan was designed and manufactured. *Id.*

43. *Id.* ¶ 16, 2003 WL 437160, at *4.

44. *Id.*

45. *Id.* ¶¶ 17-18, 2003 WL 437160, at *5 (applying RESTATEMENT (SECOND) OF CONFLICTS § 148 (1971)).

46. *Id.* ¶ 17 n.6, 2003 WL 437160, at *5 n.6 (quoting RESTATEMENT (SECOND) OF CONFLICTS § 148 (1971)).

methodology by creating a rebuttable presumption to be tested against the broad section 6 analysis. The *Ysbrand* opinion, however, omits any such discussion. Therefore, with the section 148 presumption standing unrebutted, the court held that the law of each class member's home state would govern the class fraud claims.[47] Concluding that class treatment when so many laws would apply would be unmanageable, the court decertified the class fraud claims.[48]

While *Ysbrand* is certainly notable for its outcome, its greatest significance may lie in its methodology. The Oklahoma Supreme Court gave three principal reasons for finding that Michigan had the most significant relationship to the warranty dispute. The first reason was that Michigan's interest, as the place of design and manufacture, was stronger than the interest of the states where the minivans were sold because manufacturer warranties are not negotiated.[49] The second was that Michigan's interest is greatest because, while the buyers' home states could only have an interest in applying their law to their own citizens' respective transactions, Michigan had an interest in applying its law to all of the class members' transactions because every transaction involved a Michigan actor-defendant.[50] Third, the court noted that applying Michigan law (as the state with the greatest contacts and interest) to all claims would further other Second Restatement policies, such as the needs of the interstate system, predictability, and uniformity of result, by determining the issue of product defect "in one forum with one result."[51] What makes this analysis so tantalizing is that the second and third reasons approach choice of law not from the perspective of the individual class members or their claims,[52] but from the perspective of the class action as a

47. *Id.* ¶ 18, 2003 WL 437160, at *5.

48. *Id.*

49. *Id.* ¶ 15, 2003 WL 437160, at *4. This assertion, of course, assumes that the seller made no additional representations regarding the airbags during the course of the sale. *See generally*, U.C.C. § 2-313 (1989) (stating that promises made by seller about the goods during a bargain are regarded as part of the description of those goods). On a more fundamental level, defining a state's interest based on the absence of actual negotiation of terms denotes a limited view of what makes a state "interested" for purposes of choice of law. Under conventional interest analysis, a state is "interested" if it has a policy underlying its law that would be furthered by applying that law in that case. *See* SCOLES ET AL., *supra* note 41, § 2.14, at 27. Using such a standard, the various class members' home states almost certainly would view themselves as "interested" on the basis that warranty laws serve the purpose of protecting consumers and regulating commerce — policies that would be furthered by applying home state warranty law to transactions that took place within those states regardless of whether the buyers ever looked at the warranty materials.

50. *Ysbrand* ¶ 15, 2003 WL 437160, at *4.

51. *Id.* ¶ 16, 2003 WL 437160, at *4.

52. Many courts caution that a proper choice-of-law analysis cannot be done by generically

whole. In other words, the court appears to have chosen law *for the class, as a class*.[53]

Whether a court decides choice of law on an individual class member basis or for the class as a whole can have enormous consequences. Imagine that one of the class members lives in Norman, Oklahoma and purchased his minivan at the local Chrysler dealership. Had he sued DaimlerChrysler on his own, it seems very unlikely that any Oklahoma court would have displaced presumptively applicable Oklahoma law in favor of Michigan law.[54] Indeed, the reasons for displacing Oklahoma law in the *Ysbrand* class action — the fact that Oklahoma did not have an interest in regulating out of state transactions and the benefits of having a single law apply — would not even

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comparing the interests of one state (such as the defendant's home state) with the law of all other potentially interested states, but rather must involve inquiring into the applicability of each state's law on a state-by-state basis. *See, e.g.*, Spence v. Glock, 227 F.3d 308, 312 (5th Cir. 2000) (holding that courts may not make wholesale choice-of-law conclusions but instead must make choice-of-law decisions by comparing the contacts and interests of all implicated states); Gyarmathy & Assocs., Inc. v. TIG Ins. Co., No. Civ. A. 3:02-CV-1245, 2003 WL 21339279, at *1-2 (N.D. Tex. June 3, 2003) (choice of law is determined for each class member, not class-wide); *see also* Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1188 (9th Cir. 2001) (requiring class counsel that argued that the defendant's home state law would apply in national class action to apply California's interest analysis test to each state with an interest in the application of its own law), *amended by* 273 F.3d 1266 (9th Cir. 2001). A particularly apt example of this philosophy is found in *In re Ford Motor Co. Bronco II Product Liability Litigation*, 177 F.R.D. 360 (E.D. La. 1997), in which the district court rejected class counsel's argument that Michigan law applied to all of the class's fraud and warranty claims because that was where Ford made its allegedly defective product and then concealed the defect. *In re Ford Motor Co.*, 177 F.R.D. at 370-71. The court stated that "[w]hat is required is a comparative analysis of Michigan law and the law and policies of each state with which the claim has contacts." *Id.* at 370; *see also* Chin v. Chrysler Corp., 182 F.R.D. 448, 457 (D.N.J. 1998) ("While it might be desirable for the sake of efficiency to settle upon one state, such as New Jersey, and apply its law in lieu of the other 49 jurisdictions, due process requires individual consideration of the choice of law issues raised by each class member's case before certification."); *In re* Ford Motor Co. Ignition Switch Prods. Liab. Litig., 174 F.R.D. 332, 348 (D.N.J. 1997) (same).

53. The Oklahoma Supreme Court's methodology may find some grounding from the Second Restatement. For contract issues where there is no contractual choice-of-law provision, section 188 selects the law of the state with "the most significant relationship *to the transaction and the parties*." RESTATEMENT (SECOND) OF CONFLICTS § 188(1) (1971) (emphasis added). One can read *Ysbrand* as simply equating the class action with the "transaction and the parties," and then concluding that Michigan had "the most significant relationship *to the class action*."

54. *See, e.g., In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1018 (7th Cir. 2002) (rejecting the plaintiff's request for the application of either Michigan or Tennessee law to all of the class members' claims after finding that "Indiana has consistently said that sales of products in Indiana must conform to Indiana's consumer-protection laws and its rules of contract law.").

be present in a suit brought by a single Oklahoma plaintiff. Thus, if the *Ysbrand* case stands as decided, then the Oklahoma class members in *Ysbrand* will have their warranty claims decided under a different law in the class action than they would have had as individual litigants.[55]

This is not to say that *Ysbrand* is wrongly decided. Most fundamentally, choice-of-law principles are questions of state law and state policy.[56] Conflicts regimes like the Second Restatement become "law" only when adopted by a state, and then serve only as a template, which the state may modify at the time of adoption or through judicial interpretation.[57] Thus, *Ysbrand* is, by definition, a correct articulation and application of Oklahoma conflicts principles. So long as the end results satisfy the minimum requirement of the U.S. Constitution — that the state whose law is chosen has a "significant contact or significant aggregation of contacts" with the claims asserted — the states may adopt and modify choice-of-law principles as they see fit.[58] Whatever else may be said about *Ysbrand*, the Oklahoma Supreme Court's policy decision to resolve warranty claims pursuant to the law of the manufacturer's home state satisfies this constitutional requirement.

Nor is it my current assertion that *Ysbrand* is normatively indefensible. To the extent that class structure is now an important factor under Oklahoma

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55. The same may well be true for class members from other states. Assume, for example, that a Texas resident who bought a Chrysler minivan in Dallas later sued DaimlerChrysler in Oklahoma state court. Oklahoma choice-of-law principles would still yield the presumption that Texas warranty law would apply. Here too, the reasons the *Ysbrand* court identified for displacing the law of the place of delivery would not apply. Thus, just like the Oklahoma minivan buyer, the Texas minivan buyer would receive a different warranty law as a class member (Michigan) than he would have received as an individual litigant (Texas).

56. *See* Kramer, *supra* note 30, at 569-72 (explaining why choice-of-law principles reflect policy choices that are "as substantive as it gets").

57. *See* SCOLES ET AL., *supra* note 41, § 2.19 (discussing state adoption of conflicts rules and cautioning the use of labels because of variations in adoption and practice). For a discussion of how the states have selectively adopted and modified the Second Restatement conflicts principles, see Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232, 1240-41 (1997). In stating that courts may modify conflicts principles through their judicial interpretation, I assume that any such modification is consistent with any overriding state statutory guidance on the choice of law in that context. *Ysbrand* itself is one such case, as the Second Restatement principles it sets forth operate within the ambit of the Oklahoma Commercial Code. Ysbrand v. DaimlerChrysler Corp., ¶ 12, No. 97,469, 2003 WL 437160, at *3 (Feb. 25, 2003) (citing Collins Radio Co. v. Bell, 1980 OK CIV APP 57, ¶ 18, 623 P.2d 1039, 1046-47).

58. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981) ("[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.").

conflicts law,[59] there is support for that approach. A decade ago, the American Law Institute recommended that Congress adopt federal choice-of-law rules specifically designed to select a single state's law for complex litigation in federal court.[60] The reasons given for doing so — "to maximize the efficient handling of the litigation, as well as encourage consistent results"[61] — parallel the reasons given by the Oklahoma Supreme Court in *Ysbrand* for displacing the law of the place of delivery and choosing Michigan warranty law for all class members.[62] This approach has been sharply criticized by Professor Kramer, who forcefully argues that courts should use the same choice-of-law methodology for class actions that they use for individual suits precisely to ensure that an individual's rights are not determined by whether he is an individual litigant or a class member.[63] While I am presently inclined to Professor Kramer's viewpoint for a variety of reasons,[64] I do not dispute that courts could greatly facilitate class

59. That the class action context played a role in the choice of warranty law seems undeniable. *See supra* notes 49-53 and accompanying text. It would be premature, however, to say that Oklahoma conflicts principles vary based on class structure in all cases. Indeed, one of the puzzlements of *Ysbrand* is that, while Michigan was also the only state that had an interest in applying its fraud law to all of the claims, and while resolving all of the fraud claims in one suit under one law would have fostered uniformity of result, the Oklahoma Supreme Court did not even hint at rebutting the Second Restatement presumption running to the law of the place of purchase for the fraud claims.

60. *See* AM. LAW INST., COMPLEX LITIGATION PROJECT, introductory note, at 389 (Proposed Final Draft, 1993) [hereinafter COMPLEX LITIGATION PROJECT] ("[T]he third and final underlying premise for this Chapter's choice of law rules is that it would be highly desirable if a single state's law could be applied to a particular issue that is common to all the claims and parties involved in the litigation."). The Complex Litigation Project's proposed choice-of-law rules sought a single state's law both for mass tort cases, including mass fraud, *see id.* § 6.01(a), and mass contracts, *see id.* § 6.03(a). For more comprehensive analysis of the Complex Litigation Project, see Symposium, *American Law Institute Complex Litigation Project*, 54 LA. L. REV. 833 (1994).

61. COMPLEX LITIGATION PROJECT, *supra* note 60, at 389; *see also id.* § 6.01 cmt. c, at 419 ("[T]he application of this section's standards may foster the consolidated handling of the litigation."); *id.* § 6.03 cmt. a, at 459 ("The need to apply a uniform law to govern claims being asserted under what are essentially identical or similar contracts is supported by the desire to allow the consolidation of multiple, repetitive claims and by the policy of treating parties who are in similar positions alike.").

62. *See Ysbrand*, ¶¶ 15-16, 2003 WL 437160, at *4 (factors).

63. *See, e.g.*, Kramer, *supra* note 30, at 576. The ALI's Complex Litigation Project acknowledged that its proposed choice-of-law rules would effect "a disparity in treatment" based on case structure and joinder, but felt that "the need to achieve justice among the litigants by assuring the uniform and economical treatment of their dispute justifies this difference." *See* COMPLEX LITIGATION PROJECT, *supra* note 60, at 379.

64. At the most basic level, Professor Kramer's approach best comports with my view that class actions are aggregations of individuals rather than entities unto themselves. *Compare*

adjudication by adopting conflicts principles that take note of the litigation structure.[65]

But whatever one might think of *Ysbrand*'s choice-of-law ruling for the class warranty claims from a normative perspective, its practical significance is beyond question. The plaintiffs' bar has a well-earned reputation for gravitating towards forums that are the most hospitable to class actions.[66] Few would disagree that plaintiffs' class counsel would prefer a forum whose choice-of-law rules facilitate class certification by selecting the law of a single state for the claims of all class members.[67] At a minimum, the *Ysbrand* decision presumptively tells trial judges in both the Oklahoma state court

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Coffee, *supra* note 20, at 385 (rejecting entity theory) *with* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 918-19 (1998) (advocating entity theory). At a more specific level, jurisdictions that choose law for the class necessarily subordinate the claims of some class members to the claims of others, at least unless the law chosen is the most advantageous law available to any class member. *See* Coffee, *supra* note 20, at 387 (noting that differences in the applicable law can affect claim values drastically, perhaps to the point of requiring subclasses); *see also* Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 695-96 (Tex. 2002) (discussing how choice of Texas law for all class members would benefit class members from some state but hurt class members from other states). That sin, however, may be one committed by the class representative and class counsel rather than the forum. Professor Woolley examines the relationship between choice of law and adequacy of representation in much greater depth in an upcoming article. Patrick Woolley, Choice of Law and the Certification of Mass Tort Class Actions Under Federal Rule of Civil Procedure 23(b)(3) (draft manuscript, on file with author).

65. It should be noted that much of the criticism in this area is directed at cases where a *federal* judge has manipulated general state conflicts principles in order to find that the law of a single state applied, thereby facilitating class certification. *See* Kramer, *supra* note 30, at 552 (discussing examples); *see also* Scott Fruehwald, *Individual Justice in Mass Tort Litigation: Judge Jack B. Weinstein on Choice of Law in Mass Tort Cases*, 31 HOFSTRA L. REV. 323, 348 (2002) (discussing manipulation of New York choice-of-law principles to apply New York law to national tobacco class action). While *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), prevents federal judges from doing this, it says nothing about the ability of states to manipulate their own choice-of-law principles to facilitate class certification. Indeed, were a state to explicitly adopt a choice-of-law rule applicable to class actions that differed from its ordinary conflicts principles, *Klaxon* presumably would *require* a federal court sitting in diversity to apply it.

66. *See* John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, 25 HARV. J. L. & PUB. POL'Y 143, 160-63 (2001) (discussing primary findings of study identifying certain county courts as having disproportionately high volumes of class action filings); *see also* DEBORAH R. HENSLER ET AL., CLASS ACTIONS DILEMMAS 58-63 (2000) (discussing "hot states" for class action filings).

67. *See* Sugarman et al., *supra* note 27, at B11 (asserting that plaintiffs' lawyers have been attempting "an end-run around the choice-of-law problems inherent in certifying a nationwide class" action by arguing for the universal application of the law of the defendant's headquarters); Ryan, *supra* note 27, at 480 ("[I]nevitably, in every nationwide state-law class action, the plaintiffs will argue for the application of a single state's law . . . .").

system and the federal courts sitting in Oklahoma[68] to apply the law of the defendant's home state in warranty class actions. Read more broadly, it suggests that, in a putative class action, courts may select law for the class based on the contacts and needs of the class as a whole.[69] By reducing choice of law as an obstacle to class certification, *Ysbrand* stands to increase the desirability of Oklahoma as a forum for future national state law class actions.[70]

IV. The Impact of Individual Issues on the Predominance Requirement

Even when the law of a single state governs a class claim, the predominance requirement still might block class certification if the class members must offer individualized proof for substantial issues associated with that claim. The problem of individual issues goes to the core of representative litigation; it asks whether resolving the class representative's claim really will resolve the claims of absent class members.[71] If absent class members' claims will require significant amounts of additional litigation, then the suit starts to look more like a consolidated mass trial than true representative litigation. At that point, one might fairly question whether allowing the lead plaintiff to sue as a representative achieves the efficiency goals promoted by the (b)(3) class action device.

In business and consumer class actions, a few potential individual issues come up regularly.[72] First, there may be small but significant variations in the

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68. In a diversity case, a federal court must apply the conflicts laws of the state in which it sits. *See Klaxon*, 313 U.S. at 496.

69. *See supra* notes 49-53 and accompanying text.

70. *See* Miller & Crump, *supra* note 30, at 57 (discussing the concept of magnet forums).

71. The Alabama Supreme Court put it this way: "To determine whether common issues of law or fact predominate in this case, the trial court must examine the [representative plaintiff's] causes of action and consider 'what value the resolution of the class-wide issue will have in each class member's underlying cause of action.'" Alfa Life Ins. Corp. v. Hughes, No. 1011091, 2003 WL 1949824, at *5 (Ala. Apr. 25, 2003) (quoting Reynolds Metals Co. v. Hill, 825 So. 2d 100, 104 (Ala. 2002)).

72. Damages is the most obvious issue that one might expect to require individualized proof. *See* 2 CONTE & NEWBERG, *supra* note 3, § 4:26, at 220. Following the Advisory Committee notes to the 1966 amendments to Rule 23, however, federal courts rarely base a lack of predominance on the need to calculate damages individually. *Id.*; *see also* 5 MOORE'S FEDERAL PRACTICE, *supra* note 2, § 23.46[2]. The First Circuit recently summarized this view: "The individuation of damages in consumer class actions is rarely determinative under Rule 23(b)(3). Where, as here, common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain." Smilow v. S.W. Bell Mobile Sys., Inc., 323 F.3d 32, 40 (1st Cir. 2003). *But see* O'Sullivan v. Countrywide Home Loans, Inc., 319 F.3d 732, 744-45 (5th Cir. 2003) (holding that the trial court erred in certifying class action because of the need for extensive individual

transactions that the different class members had with the defendant. Second, even when the class members engaged in virtually identical transactions, the court may require them to make individualized showings of certain elements, one of the most important being reliance. This Part examines how Oklahoma courts have addressed those individual issue complications under section 2023(B)(3).[73]

A. Transactional Variations

On the surface, an allegation that a defendant engaged in a common scheme of misconduct might seem to inherently satisfy the section 2023(B)(3) predominance requirement, but this really depends on what was "common" about the alleged misconduct. Sometimes the class members share the common characteristic of having purchased the same inferior product from the defendant.[74] Other times the characteristic common to the class members is that the defendant applied a uniform practice in its business dealings with them.[75] But common misconduct in either sense does not necessarily establish

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damages calculations). The only Oklahoma case to address this issue is in accord with the majority view. *See* Perry v. Meek, 1980 OK 151, ¶ 15, 618 P.2d 934, 939 ("[T]he fact that members of the class will be called upon to establish individual accountings of the amount of their damages shall not of itself defeat a class action.").

73. Individual issues can have a very similar impact on predominance in other contexts. In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), for example, the U.S. Supreme Court found that individual issues relating to exposure and causation predominated in a proposed asbestos class action. *Amchem*, 521 U.S. at 624-25 (also noting that state law differences compounded the problem). While no published Oklahoma decision addresses individual issues in a mass tort class action context, one might draw profitable parallels between the individual issues of exposure and causation in mass tort cases and the individual issues of transactional variance and reliance in commercial cases. For general discussion of the impact of individual issues on predominance in mass tort cases, see 5 MOORE'S FEDERAL PRACTICE, *supra* note 2, § 23.47[4].

74. *See, e.g.*, *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1015 (7th Cir. 2002) (alleging that defendants engaged in "conduct that was uniform across the nation" by selling defective tires); Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 673-74 (7th Cir. 2001) (alleging common misconduct of selling defective machine tool); *In re* St. Jude Med., Inc. Silzone Heart Valves Prods. Liab. Litig., NO. MDL 01-1396 JRT/FLN, 2003 WL 1589527, at *5 (D. Minn. Mar. 27, 2003) (finding that design, manufacture, marketing, and selling of allegedly defective product was conduct "uniform across all plaintiffs").

75. *See, e.g.*, *Smilow*, 323 F.3d at 34 (alleging common misconduct of charging customers for incoming calls contrary to uniform contract terms); Moore v. PaineWebber, Inc., 306 F.3d 1247, 1250 (2d Cir. 2002) (alleging that class members were all victims of defendant's coordinated scheme to misrepresent an insurance product as a retirement savings product); Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 171 (3d Cir. 2001) (alleging that defendants uniform practice of executing trades at NASDAQ bid price, when better prices were available through other sources, was a common scheme of unlawful conduct).

that the class members' common issues predominate over individual issues because, while the defendant's ultimate actions were essentially the same for all, their original bargains might have been different. In other words, uniformity of performance allows for true representative litigation only when joined with uniformity of obligation. As to any particular class member, we cannot know if the defendant told a lie or breached a promise until we know what the defendant communicated to that class member in the first place.[76]

Class claims for fraud offer a useful insight into the relationship between transactional variance and predominance. At one end of the spectrum, the federal courts view oral misrepresentations as presumptively individualized, and therefore typically deny class certification unless the plaintiff can show that there was no material variation in the misrepresentations.[77] At the other end of the spectrum, the courts are much more likely to find predominance in a class action based on written misrepresentations because of the belief that individual proof is not necessary to establish the details of each transaction.[78]

The Oklahoma Supreme Court takes a pragmatic approach to transactional variance. In *KMC Leasing, Inc. v. Rockwell-Standard Corp.*,[79] for instance, the court found that variations in the contracts of the individual class members supported the trial court's decision to deny certification.[80] In *Black Hawk Oil Co. v. Exxon Corp.*,[81] however, the court found that variations in the contracts did not preclude certification.[82] The decisions are quite easy to reconcile, however. In *Black Hawk Oil*, the court rejected defendant Exxon's contention that a factfinder would need to interpret each of the 600 different contracts involved separately because the court found that the contracts fell into four general categories.[83] In contrast, class members in *KMC Leasing* had

76. Predominance concerns can exist even when there is both a common conduct and a common duty. *See, e.g., O'Sullivan*, 319 F.3d at 742 (demonstrating that the common closing practice in a Real Estate Settlement Procedures Act (RESPA) suit alleging a practice of overcharging for closing services was insufficient to overcome predominance because liability would require individual comparisons of compensation to actual services).

77. *See Moore*, 306 F.3d at 1253-55 (discussing decisions from the Third, Fourth, Fifth, Sixth, and Seventh Circuits); *see also* 7B WRIGHT ET AL., *supra* note 21, § 1782, at 56 ("[I]f the action was based on consumer fraud and defendant was alleged to have perpetrated the fraud by means of oral misrepresentations, the common questions probably would not be found to predominate.").

78. *See* 5 MOORE'S FEDERAL PRACTICE, *supra* note 2, § 23.47[1][b][ii] (discussing written misrepresentations in securities fraud).

79. 2000 OK 51, 9 P.3d 683.

80. *Id.* ¶ 24, 9 P.3d at 690-91.

81. 1998 OK 70, 969 P.2d 337.

82. *Id.* ¶ 20, 969 P.2d at 344.

83. *Id.* ¶¶ 19-20, 969 P.2d at 344; *see also* Handley v. Santa Fe Minerals, Inc., 1992 OK CIV APP 149, ¶ 9, 849 P.2d 433, 435 (disregarding contract variances that did not impact the

nonuniform purchase contracts, such that "the trial court would be forced to analyze each individual contract as to its disclaimers, warranties, applicable choice of law and statute of limitation."[84] Thus, transactional variance matters in Oklahoma, but only to the extent the contracts actually vary in a material way.

One Oklahoma Court of Civil Appeals decision takes a different — and somewhat questionable — approach to predominance and contract variance. In *Greghol Ltd. Partnership v. Oryx Energy Co.*,[85] the putative class consisted of royalty and royalty-interest owners who alleged that Oryx Energy improperly assessed post-production charges against their royalties.[86] Oryx Energy argued that the validity of post-production charges was a contractual matter, and presented testimony showing that the class members' contracts did not have uniform royalty clauses.[87] The court of civil appeals affirmed certification of the class despite what appeared to be relevant and significant royalty clause variations, claiming that the predominant issue was whether Oryx Energy assessed post production charges against all interest owners equally, "regardless of the terms of their conveyances."[88] Certainly, the putative class alleged that Oryx did so. But whether Oryx's conduct was unlawful depends on the terms of its contracts with the class members. In other words, only by looking at the interest owners' contracts can the court know what Oryx's obligations were in the first place. If the court's preliminary conclusion had been that Oryx entered into essentially the same deal with every interest owner, then there would be little transactional variance requiring individualized proof. But if, as may have been the case here, the court would have to compare Oryx's uniform conduct against a wide range of contractual obligations, then it is difficult to see how the issue of

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royalty clause underlying the class-wide claim).

84. *KMC Leasing*, ¶ 24, 9 P.3d at 690; *see also* Sias v. Edge Communications, Inc., 2000 OK CIV APP 72, ¶ 18, 8 P.3d 182, 188 (affirming denial of class certification where the plaintiff "has not established that the different designs uniformly indicated a 19 cents a minute rate or failed to mention access and interconnect fees, or that the point of sale marketing was in other material respects uniform"). It is also important to note that in each case the Oklahoma Supreme Court upheld the trial court's original decision — to grant class certification in *Black Hawk Oil* but to deny class certification in *KMC Leasing* — under an abuse of discretion standard. Thus, perhaps the lesson to be learned is that a court does not abuse its discretion by either: (1) granting class status in a contract case where the trial court feels it can harmonize the contracts; or (2) denying class status in a contract case where the trial court feels it would need to construe each contract separately.

85. 1998 OK CIV APP 111, 959 P.2d 596.

86. *Id.* ¶ 2, 959 P.2d at 597-98.

87. *Id.* ¶ 4, 959 P.2d at 598.

88. *Id.* ¶ 7, 959 P.2d at 599.

Oryx's uniform method of imposing post production charges predominates over the individual issues of what charges Oryx was entitled to impose on any particular interest owner.[89]

B. Reliance

One of the most prominent issues in (b)(3) class certification is whether a putative class can satisfy the predominance requirement when reliance is an element of the cause of action. Specifically, certain causes of action — fraud being the most prominent — typically require that the plaintiff prove both that the defendant made an improper representation and that the plaintiff relied on it to his detriment.[90] As a result, even where the class can establish obligation and breach via common proof, individual proof still might be required to ascertain whether each class member relied on the defendant's common misconduct. It goes without saying that the potential need to prove reliance on a class-member-by-class-member basis has severe implications for the court's task of deciding whether common issues predominate over individual issues.

At the outset, it is important to distinguish between situations where reliance is an element of the plaintiff's cause of action from situations where it is more akin to an affirmative defense of "nonreliance." In certain types of federal securities fraud contexts, for example, the U.S. Supreme Court has interpreted the underlying law to presume that the individual investors relied on the defendant's misrepresentations.[91] Thus, there is a rebuttable

89. *See also* Shockey v. Chevron U.S.A., Inc., No. CJ-2001-7, slip op. (Washita County, July 3, 2002) (opinion on file with author) (finding predominance because Chevron "uniformly" disregarded lease language when calculating royalties, despite claim by Chevron that the court would need to look to the language of each lease to determine what royalties were owed).

90. *See* Rogers v. Meiser, 2003 OK 6, ¶ 17, 68 P.3d 967, 977 (listing elements of common law fraud, including reliance); RESTATEMENT (SECOND) OF TORTS § 537 (1977). In contrast, state consumer protection statutes typically no longer require plaintiffs to prove reliance. *See* Seth W. Goren, *A Pothole on the Road to Recovery: Reliance and Private Class Actions Under Pennsylvania's Unfair Trade Practices and Consumer Protection Law*, 107 DICK. L. REV. 1, 13 & n.50 (2002) (listing requirements by state). For this reason, one publication notes that, in cases where a state deceptive practices act remedy is available, "it is pragmatic to omit a common law fraud claim unless there is some compelling reason to include it." NAT'L CONSUMER LAW CTR., CONSUMER CLASS ACTIONS § 1.5.3, at 16 (5th ed. 2002).

91. *See* Basic, Inc. v. Levinson, 485 U.S. 224, 248 (1988) ("fraud on the market" presumption for Rule 10b-5 claims associated with securities traded in a developed market); Affiliated Ute Citizens v. United States, 406 U.S. 128, 153 (1972) (reliance presumed in securities fraud cases stemming from a defendant's nondisclosure of material information). In those cases, predominance is more readily met because the Supreme Court has relieved the class members of having to individually prove reliance. *See* William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 392 (2001) ("[F]raud-on-the-market enables

presumption of reliance that shifts the burden to the defendant to offer proof of nonreliance.[92] Similarly, the law of express warranty no longer requires buyers to prove that they relied on the seller's representations or affirmations of fact, but instead requires the defendant to offer "clear affirmative proof" that such representations or affirmations were not part of the "basis of the bargain."[93] This too creates a de facto presumption of reliance that shifts the burden of proving nonreliance onto the defendant seller.[94] In cases where the plaintiffs may properly invoke a presumption,[95] courts typically do not view the issue of reliance as an obstacle to satisfying the predominance requirement.[96]

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certification by turning common-law individual issues into market-based common issues.").

92. *See Basic*, 485 U.S. at 248 (stating that defendants may rebut presumption with "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price"); *see also* 5 MOORE'S FEDERAL PRACTICE, *supra* note 2, § 23.47[1][c][i] (discussing rebuttable presumption in nondisclosure cases under *Affiliated Ute Citizens*).

93. *See* U.C.C. § 2-313 cmt. 3 (1989) ("In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence, no particular reliance on such statements need be shown . . . . Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof."); *see also* Samuel Issacharoff, *The Vexing Problem of Reliance in Consumer Class Actions*, 74 TUL. L. REV. 1633, 1652 (2000) (arguing that "basis of the bargain" does not incorporate a reliance element but instead is defined by the seller's conduct).

94. *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 9-5, at 352 (5th ed. 2000). The authors are careful to note, however, that some courts have interpreted the "basis of the bargain" principle to require proof of reliance. *Id.*; *see also* Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 686 & n.23 (Tex. 2002) (holding that Texas warranty law requires reliance "to a certain extent").

95. Courts often reject arguments that a presumption is available. *See, e.g.*, McManus v. Fleetwood Enters., Inc., 320 F.3d 545, 549 (5th Cir. 2003) ("Reliance may not be presumed under Texas law."); Sikes v. Teleline, Inc., 281 F.3d 1350, 1362 (11th Cir. 2002), *cert denied*, 537 U.S. 884 (2002) (reliance may not be presumed under RICO); Cohn v. Mass. Mut. Life Ins. Co., 189 F.R.D. 209, 215-16 (D. Conn. 1999) (reliance may not be presumed under Connecticut law). *But see* Spark v. MBNA Corp., 178 F.R.D. 431, 436 (D. Del. 1998) (presuming reliance under RICO because "it is 'logical' to presume reliance in this case," and then finding predominance). *See generally* 5 MOORE'S FEDERAL PRACTICE, *supra* note 2, § 23.47[2] (unlike the rule in securities fraud cases, "plaintiffs must prove individual reliance" in consumer fraud actions).

96. *See* 5 MOORE'S FEDERAL PRACTICE, *supra* note 2, § 23.47[1][c][iii] (stating that reliance is not a bar to certification in securities fraud cases when it may be presumed). The way courts view presumed reliance parallels their approach to affirmative defenses generally. Courts seem to discount individual issues when they are part of the defendant's proof rather than the plaintiff's. *See* Smilow v. S.W. Bell Mobile Sys., Inc., 323 F.3d 32, 39 (1st Cir. 2003) ("Courts traditionally have been reluctant to deny class action status under Rule 23(b)(3) simply because affirmative defenses may be available against individual members."); Shores v. First City Bank Corp., 1984 OK 67, ¶ 16, 689 P.2d 299, 304 ("The claim that there exists sufficient individual

When the burden of proving individual reliance is placed squarely on the plaintiff, it can be fatal to meeting the predominance requirement.[97] The Fifth Circuit, for example, has adopted an almost per se rule that the need to establish reliance on a class-member-by-class-member basis precludes a finding of predominance.[98] Indeed, the federal courts reject class certification even in securities cases where the presumption of reliance is not applicable, reasoning that the class members' need to prove individual reliance precludes a finding of predominance.[99] But while the need to prove individual reliance

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statute of limitations defenses to prevent class action certification has not found much favor with the courts . . . ."); *see also* 2 CONTE & NEWBERG, *supra* note 3, § 4:26, at 243-44 (existence of "affirmative defenses against various class members" usually will not bar finding of predominance); 5 MOORE'S FEDERAL PRACTICE, *supra* note 2, § 23.46[3] (stating that statute of limitations issues typically do not bar certification). Though I do not intend to resolve the issue here, I have some doubt about whether predominance ought to vary based on who bears the burden of proving an issue. In fraud cases, for example, it is unclear why the existence of a presumption would satisfy predominance in cases where the defendant asserts that it will attempt to rebut the presumption of reliance for every class member; each case would require class-member-by-class-member proof explaining why that class member entered into the transaction at issue. *See, e.g.*, Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indem. Ins. Co., 319 F.3d 205, 221 (5th Cir. 2003) (finding that predominance is not satisfied by expert testimony of industry reliance because even though it might persuade a trier of fact, it "would not justify excluding proof demonstrating a lack of reliance by individual plaintiffs"); Gyamarthy & Assocs., Inc. v. TIG Ins. Co., No. Civ. A. 3:02-CV-1245, at *3 (N.D. Tex. June 3, 2003) (noting that predominance depends not just on the plaintiff's issues and proof but the defendants as well).

97. *See, e.g.*, Miller v. Gen. Motors Corp., No. 98-C-7389, 2003 WL 168626, at *3 (N.D. Ill. Jan. 27, 2003) (stating that it would consider certifying fraud class only for states in which reliance is not an element or where it can be presumed); *In re* Managed Care Litig., 209 F.R.D. 678, 691-92 (S.D. Fla. 2002) ("The only way to determine what each plaintiff relied upon is to ask each individual plaintiff — something which, if done, precludes class certification because individual issues will predominate over the class issues."). *See generally* 5 MOORE'S FEDERAL PRACTICE, *supra* note 2, § 23.47[2] ("[C]ourts have generally denied class certification in private consumer fraud actions brought under state law or [RICO] because individual [reliance] questions predominate in such cases."). For a more extended (albeit defense-oriented and Texas-focused) analysis of the effect of reliance on predominance, see The Appellate Practice Group of Locke Liddell & Sapp, LLP, *Recurring Issues in Consumer and Business Class Action Litigation in Texas*, 33 TEX. TECH. L. REV. 971, 1018 (2002) (arguing that courts cannot certify (b)(3) class actions when reliance must be proved individually without the benefit of any presumption).

98. *See McManus*, 320 F.3d at 550 (holding that the need to prove individual reliance precludes class certification of fraud and breach of warranty claims); Patterson v. Mobil Oil Corp., 241 F.3d 417, 419 (5th Cir. 2001) ("Claims for money damages in which individual reliance is an element are poor candidates for class treatment, at best. We have made that plain."); Castano v. Am. Tobacco Co., 84 F.3d 734, 745 (5th Cir. 1996) ("[A] fraud class action cannot be certified when individual reliance will be an issue.").

99. *See, e.g.*, Johnston v. HBO Film Mgmt., Inc., 265 F.3d 178, 191-93 (3d Cir. 2001)

makes class certification difficult, it is not impossible. Some courts have refused to consider individual reliance as a bar to predominance on the basis that it goes to the plaintiff's right to recover, rather than to "underlying common issues of the defendant's liability."[100] In other cases, courts have acknowledged that individual reliance is a factor but nevertheless find that, for the case as a whole, the issues that are indisputably common simply predominate over reliance, even when the proof will be individualized.[101]

Some apparent tension between cases from the Oklahoma Supreme Court and the Oklahoma Court of Civil Appeals suggests that this issue is still evolving under section 2023. The court of civil appeals has twice explicitly cited the need for each class member to prove reliance as a basis for rejecting class certification of fraud claims.[102] In contrast, the Oklahoma Supreme Court has twice rejected reliance-based predominance challenges to class certification. In *Black Hawk Oil*, the court acknowledged that reliance was an essential element of the class members' claim that Exxon defrauded them by sending incomplete monthly statements,[103] but nevertheless upheld class certification on the basis that "[t]he need to show individual reliance has not precluded class [action] treatment in cases where standardized written

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(affirming denial of certification because securities fraud claim involved affirmative misrepresentations regarding securities that were not traded on an open and efficient market, for which there is no presumption of reliance); Kelley v. Mid-America Racing Stables, Inc., 139 F.R.D. 405, 409 (W.D. Okla. 1990) (concluding that "issues of individual reliance will overwhelm other common issues, and common issues will not predominate" after finding that presumption did not apply); *see also* Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 174-75 (3d Cir. 2001) (discussing presumptions available under different securities fraud theories). Accordingly, one should keep these presumptions in mind when reading the Supreme Court's recent statement that "[p]redominance is a test readily met in *certain* cases alleging consumer or securities fraud." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997) (emphasis added).

100. *See* 2 CONTE & NEWBERG, *supra* note 3, § 4:26, at 241.

101. *See, e.g.*, Bussie v. Allmerica Fin. Corp., 50 F. Supp. 2d 59, 71 (D. Mass. 1999) (finding that common issues predominated despite existence of individual issues like reliance and damages); Arenson v. Whitehall Convalescent & Nursing Home, Inc., 164 F.R.D. 659, 666 (N.D. Ill. 1996) (finding predominance despite need to prove individual reliance for common law fraud claim).

102. *See* Sias v. Edge Comm., Inc., 2000 OK CIV APP 72, ¶ 18, 8 P.3d 182, 188; Bunch v. KMart Corp., 1995 OK CIV APP 41, ¶ 6, 898 P.2d 170, 172; *see also* Conatzer v. Am. Mercury Ins. Co., 2000 OK CIV APP 141, ¶ 25, 15 P.3d 1252, 1258 (citing *Bunch* and affirming denial of class certification in used car certificate fraud case in part because of "factual variables" including individual reliance).

103. Black Hawk Oil Co. v. Exxon Corp., 1998 OK 70, ¶ 29, 969 P.2d 337, 345. The monthly statements failed to account for the "slop oil" that Exxon collected but failed to pay royalties on. *Id.* ¶ 30, 969 P.2d at 345.

misrepresentations have been made to class members."[104] The *Ysbrand* opinion also acknowledged the possibility of an individual reliance requirement (under Michigan warranty law), but still upheld class certification of the warranty claims, explaining that "[f]actual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory."'[105]

If the passages from *Black Hawk Oil* and *Ysbrand* articulate Oklahoma's view about certifying a class action in which individual reliance might be an element, then Oklahoma seems to have adopted a relatively liberal approach to certifying such class actions. There is a danger of drawing too strong a conclusion from these cases, however. The court did not state that the need to prove reliance was not a factor at all, just that it did not appear to be an insurmountable one under the circumstances. Thus, *Black Hawk Oil* and *Ysbrand* may simply reflect the Oklahoma Supreme Court's deference to trial courts on issues of case management.[106] But even so, such a view would represent a notable departure from the hard-line approach of other jurisdictions where the presence of individual reliance presumptively forecloses (b)(3) class certification.[107] Like Oklahoma's approach to choice of law, a liberal approach to predominance in cases involving individual reliance also might raise the antenna of class counsel engaged in the process of selecting a forum.

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104. *Id.* ¶ 30, 969 P.2d at 345 (quoting 4 CONTE & NEWBERG, *supra* note 3, § 22:49, at 22-201 (3d ed. 1992)). It is important to differentiate the issue of transactional variation discussed above. In that context, the courts treat oral and written misrepresentations differently based on what proof might be needed to establish the terms of the defendant's obligation to individual class members. *See supra* notes 74-89 and accompanying text. Here, the question is whether the plaintiff acted because of those misrepresented terms or for some other reason. In this latter context, having predominance turn on whether the misrepresentation was oral or written assumes that a class member would be more likely to rely on a written misrepresentation versus an oral one.

105. Ysbrand v. DaimlerChrysler Corp., 2003 OK 17, ¶ 21, No. 97,469, 2003 WL 437160, at *6 (quoting Lobo Exploration Co. v. Amoco Prod. Co., 1999 OK CIV APP 112, ¶ 17, 991 P.2d 1048, 1055). The court offered two additional reasons for its ruling. First, it suggested that it considered the topic off limits, stating that "[w]hether individual findings of reliance are required goes to the merits of the claims." *Id.* Second, the court noted that any problems created by the need to address individual issues could be resolved by certifying issue classes under section 2023(C)(4)(a) or subclasses under section 2023(C)(4)(b). *Id.* I discuss the permissibility of making merits inquiries at the certification stage and the use of subclasses and issue classes to alleviate individual issue problems in Part V *infra*.

106. *See infra* notes 142-47 and accompanying text.

107. *See supra* notes 97-99 and accompanying text.

V. The Scope and Depth of the Certification Inquiry

On the surface, the mechanics of certifying a class action in Oklahoma are both well established and straightforward. The party seeking class certification — almost always the plaintiff — has the burden of proving each of the requisite elements for the type of class action proposed.[108] In assessing the plaintiff's showing, however, the trial court should give the class plaintiffs the benefit of the doubt: "The pragmatically correct action, in the face of a close question as to certification, has been said to sustain certification because if it develops later during the course of the trial that the order is ill advised, the order is always (prior to judgment on the merits,) subject to modification."[109] While the trial court's certification decision is immediately reviewable,[110] the appellate court may reverse only for abuse of discretion.[111]

This relatively simple procedural framework, however, masks a more complicated reality. The plaintiff and defendant may have very different views about what issues will be in dispute and how they should be tried, let alone how each issue's relative weight and significance impacts the predominance requirement. Thus, the trial court's first task is to determine what the issues in the class action actually will be. The trial court must then consider the mechanics and logistics of trying those issues, including whether the class action can be structured in a way to minimize the effect of the individual issues. Only then can the trial court determine whether the common issues predominate over the individual ones.

A. Scrutinizing the Content of the Claims and Defenses

Perhaps the most basic principle governing the class certification inquiry is that trial courts are not to engage in merits analysis.[112] While this principle is universally acknowledged, however, it is not universally understood or

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108. *See* KMC Leasing, Inc. v. Rockwell-Standard Corp., 2000 OK 51, ¶ 12, 9 P.3d 683, 688.

109. *Ysbrand*, ¶ 5, 2003 WL 437160, at *2 (quoting Perry v. Meek, 1980 OK 151, ¶ 19, 618 P.2d 934, 940).

110. *See* 12 OKLA. STAT. § 993(A)(6) (2001).

111. *See KMC Leasing*, ¶ 5, 9 P.3d at 687 (holding that an order denying certification should be reviewed for abuse of discretion); Black Hawk Oil Co. v. Exxon Corp., 1998 OK 70, ¶ 10, 969 P.2d 337, 342 (holding that an order granting certification should be reviewed for abuse of discretion).

112. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."); *see also Black Hawk Oil*, ¶ 29, 969 P.2d at 345 (noting that courts may not consider the merits of the case on a certification motion).

applied.[113] As originally pronounced, the so-called "Eisen" rule meant that courts should not base their certification decisions on whether they thought the claims of the class would succeed or fail.[114] The reasoning behind this rule was that class actions should run the risk of losing as well as winning.[115] If courts certified only cases that they thought were "winners," then the class action device would subject defendants to global losses, but never allow them to achieve global wins.[116] Over time, however, the bar against making merits evaluations at certification evolved in some courts into a rule that prevented the trial judge from scrutinizing the parties' assertions about what they intended to prove and how they intended to prove it.[117]

Properly understood, the "Eisen" rule encompasses only its narrower meaning — that courts should not evaluate the merits *for the purpose of sifting the "winners" from the "losers,"* and then certifying only the winners. However, it does not obligate the court to blindly accept the representations of the party seeking certification, nor does it prohibit the court from drawing its own conclusions about what issues will need to be decided and how.[118] To the contrary, scholars and most courts now recognize that the certification process *requires* courts to delve into the merits, at least insofar as that is necessary to know what the issues will be and how the parties intend to prove them.[119] As one recent article explains,

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113. *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1270 (2002) (asserting that variations in understanding of the rule has produced a "muddled body of case law").

114. *See* 5 MOORE'S FEDERAL PRACTICE, *supra* note 2, § 23.46[4].

115. *See* Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 677 (7th Cir. 2001).

116. *See id.*

117. *See* Bone & Evans, *supra* note 113, at 1272.

118. *See* Gen. Tel. Co. v. Falcon, 457 U.S. 147, 160-61 (1982) (requiring trial courts to perform a "rigorous analysis" of the Rule 23(a) prerequisites and instructing that in doing so the courts are free "to probe behind the pleadings"); *see, e.g.*, Johnston v. HBO Film Mgmt., Inc., 265 F.3d 178, 189 (3d Cir. 2001) (reviewing factual record to see if plaintiffs really did receive uniform representations).

119. *See* Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 168 (3d Cir. 2001) ("In reviewing a motion for class certification, a preliminary inquiry into the merits is sometimes necessary to determine whether the alleged claims can be properly resolved as a class action."). *See generally* 5 MOORE'S FEDERAL PRACTICE, *supra* note 2, § 23.61[5] ("In some cases it may be necessary to make a preliminary inquiry into the merits when that determination is necessary to a certification inquiry, and this is not forbidden by *Eisen*."). The advisory committee notes to the proposed amendments to Federal Rule of Civil Procedure 23 also express this view:

> Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery

> To assess predominance, for instance, a judge has to determine which common questions are serious subjects for litigation and how much of the litigation will be devoted to resolving them. So too she must predict which individual questions will loom large, how important they will be, and how much time and energy will be devoted to litigating them.[120]

Thus, the trial court can and should assess the parties claims and proofs, but should do so from an outcome-neutral vantage point of trial mechanics, certifying apparent "losers" when the issues and proofs are predominantly common, but denying certification to apparent "winners" when the court is convinced that the individual issues are too numerous and significant.

Oklahoma case law suggests some lingering confusion about whether Oklahoma courts may consider the impact of individual issues on predominance without violating the rule against prejudging the merits. The confusion seems to stem from the Oklahoma Supreme Court's decision in *Black Hawk Oil v. Exxon Corp*, in which the court quoted another case for the proposition that "'[d]efendants may raise non-reliance as an affirmative defense at trial but it is inappropriate to raise non-reliance at the certification stage because entry into the intricacies of reliance goes to the merits of the case and cannot be considered by a court on a certification motion.'"[121] Subsequently, one Oklahoma Court of Civil Appeals case interpreted that passage to specifically preclude considering a defendant's argument that the common issues did not predominate in that case because each plaintiff would

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> into the "merits," limited to those aspects relevant to making the certification decision on an informed basis.

See FED. R. CIV. P. 23 advisory committee's note (Proposed 2003), *available at* http://www.uscourts.gov/rules/congress0303.html.

120. Bone & Evans, *supra* note 113, at 1269. The Fifth Circuit recently elaborated on this point:

> Determining whether legal issues common to the class predominate over individual issues requires that the court inquire how the case will be tried. This entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class. Although this inquiry does not resolve the case on its merits, it requires that the court look beyond the pleadings to "understand the claims, defenses, relevant facts, and applicable substantive law." Such an understanding prevents the class from degenerating into a series of individual trials.

O'Sullivan v. Countrywide Home Loans, Inc., 319 F.3d 732, 738 (5th Cir. 2003) (citations omitted) (quoting Castano v. Am. Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996)).

121. 1998 OK 70, ¶ 29, 969 P.2d 337, 345 (quoting Gorsey v. I.M. Simon & Co., 121 F.R.D. 135, 139 (D. Mass. 1988)).

need to prove reliance individually.[122] And most recently, the *Ysbrand* court hinted at a similar result.[123] Broadly read, these decisions could handcuff litigants and courts in their efforts to identify the existence of individual issues that would argue against a finding of predominance.

More probably, however, the Oklahoma Supreme Court subscribes to the modern view that a court may consider the merits insofar as they inform what individual issues might be a part of the adjudicatory process. First, when put in context, the passage from *Black Hawk Oil* supports the modern flexible view rather than a rigid "merits" bar. The defendant's argument against certification in *Black Hawk Oil* was that the class plaintiffs in fact could not prove reliance.[124] The court's response, which immediately precedes the passage usually quoted, was that "[i]nability to prove reliance may ultimately defeat [the plaintiffs'] claims but the mere possibility that their proof on this issue might fail is not grounds to deny certification of the class."[125] Thus, the holding of *Black Hawk Oil* was no more than that courts should not allow their beliefs about whether a case is strong or weak to impact their assessment of whether the class certification requirements are met. More recently, in *KMC Leasing v. Rockwell-Standard, Inc.*, the Oklahoma Supreme Court had occasion to reflect on the significance of *Black Hawk Oil.* The plaintiffs apparently invoked *Black Hawk Oil* to argue that the trial court had improperly considered the merits when it assessed the predominance of individual issues, including reliance.[126] In response, the court explained that "[e]ven though the potential inability of proposed class representatives to prove their fraud claims relates to the merits and is inappropriate to the certification stage, (*see Black Hawk Oil Co. v. Exxon Corp.*, 1998 OK 70, ¶ 18, 969 P.2d 337, 343 (*amended on denial of reh'g.*)) the process itself is appropriate for consideration."[127]

122. *See* Lobo Exploration Co. v. Amoco Prod. Co., 1999 OK CIV APP 112, ¶ 14, 991 P.2d 1048, 1054.

123. In response to DaimlerChrylser's argument that common issues did not predominate because each class member would need to prove that she relied on DaimlerChrysler's warranties, the court began by stating that "[w]hether individual findings of reliance are required goes to the merits of the claims." Ysbrand v. DaimlerChrysler Corp., 2003 OK 17, ¶ 21, No. 97,469, 2003 WL 437160, at *6 (Feb. 25, 2003). It did not cite to *Black Hawk Oil*, however, nor did it rely on the alleged merits bar, but instead actually considered the impact of potential individual issues, ultimately concluding that the common issues still predominated. *See id.*

124. *See Black Hawk Oil*, ¶ 29, 969 P.2d at 345.

125. *Id.*

126. KMC Leasing, Inc. v. Rockwell-Standard Corp., 2000 OK 51, ¶ 27, 9 P.3d 683, 691.

127. *Id.* ¶ 26, 9 P.3d at 691. The court made a similar, albeit less opaque, comment with respect to choice of law. While it held that the ultimate determination of what law would apply was a merits issue, it deemed itself empowered to consider and factor in the multitude of issues that might conceivably require a different law when making its predominance ruling. *Id.* ¶ 20,

It is important to appreciate that delving into the merits to identify the moving parts for trial does not reflect a bias against class certification. It is true that a process that asks the trial court to take a hard look at the plaintiff's claims will often result in the conclusion that they include essential elements that defy common proof.[128] However, that same process also permits courts to scrutinize defendants' claims that predominance is inappropriate because of the individual proof defendants claim will be necessary.[129] Indeed, almost twenty years ago the Oklahoma Supreme Court appears to have done just that in concluding that the statute of limitations issue a defendant claimed precluded a finding of predominance was "not a real issue."[130] It may be that deeper merits of scrutiny may have a greater impact on plaintiffs because they are more likely to carry the burden of proving an individual issue. Any such disparate impact, however, is a function not of procedural bias but the underlying substantive law.

B. Certifying a Class Without Determining How the Individual Issues Will Be Resolved

Determining predominance requires the court to do more than just identify which issues are amenable to common proof and which require individual proof. In addition, the court must make a qualitative judgment about the relative significance and weight of those issues.[131] One important methodological issue that arises concerns the type of analysis that a court is

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9 P.3d at 690.

128. *See, e.g.*, Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indem. Ins. Co., 319 F.3d 205, 220 (5th Cir. 2003) (rejecting plaintiff's assertion that it could conclusively establish reliance through expert testimony of business custom); Johnston v. HBO Film Mgmt., Inc., 265 F.3d 178, 186, 191-93 (3d Cir. 2001) (rejecting plaintiff's assertion that court could presume reliance after inspecting the record and concluding that the misrepresentations were not uniform and that the plaintiffs were asserting a type of securities claim that does not carry a reliance presumption).

129. *See, e.g.*, Smilow v. S.W. Bell Mobile Sys., Inc., 323 F.3d 32, 39 (1st Cir. 2003) (rejecting defendant's assertion that individual "waiver" issues would overwhelm common issues); *In re* Linerboard Antitrust Litig., 305 F.3d 145, 163 (3d Cir. 2002) (rejecting defendant's assertion that trial of individual fraudulent concealment issues would overwhelm common issues); *In re* Corel Corp. Inc. Sec. Litig., 206 F.R.D. 533, 544 (E.D. Pa. 2002) (finding that defendants failed to show that they could rebut reliance presumption such that individualized reliance proofs would be necessary).

130. Shores v. First City Bank Corp., 1984 OK 67, ¶ 16, 689 P.2d 299, 304 ("On the record here it does not appear likely that there will be numerous bondholders who should have discovered the bank's alleged defalcations sufficiently long ago to allow the running of the statute of limitations.")

131. *See supra* notes 20-26 and accompanying text.

required to perform before it may conclude that the common issues predominate over the individual ones.

Some jurisdictions require trial courts to offer concrete plans for resolving individual issues before certifying a (b)(3) class action. In Texas, for example, a class certification order must include "a rigorous analysis and a specific explanation of how class claims are to proceed to trial."[132] While the trial court need not draft a formal trial plan,[133] the "certification order must indicate how the claims will likely be tried so that conformance with [Rule 23(b)(3)] may be meaningfully evaluated."[134] The Texas Supreme Court adopted this rule in large part to combat what it referred to as the "certify now and worry later" approach to class certification in which trial courts deflected potential individual issue problems by assuming that they could either solve them later or, if not, decertify the class.[135] Thus, in Texas state court, "[i]f it is not determinable from the outset that the individual issues can be considered in a manageable, time-efficient, yet fair manner, then certification is not appropriate."[136] Along those lines, the proposed amendments to Federal Rule Civil Procedure 23 delete the existing reference to "conditional" certification on the basis that "[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met."[137]

The Oklahoma Supreme Court, however, has given no indication that it intends to adopt any such requirement.[138] Indeed, rather than place a heavy burden on plaintiffs at certification, the court's longstanding practice has been to give plaintiffs the benefit of the doubt, believing that the trial court can modify the certification order if it turns out to have been ill advised.[139] In that same vein, the Oklahoma Supreme Court seems content to rely on the prospect

132. Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 689 (Tex. 2002); *see also* S.W. Ref. Co. v. Bernal, 22 S.W.3d 425, 435 (Tex. 2000).

133. *See Schein*, 102 S.W.3d at 689.

134. *Bernal*, 22 S.W.3d at 435.

135. *See id.* at 434-35.

136. *Id.* at 436.

137. *See* FED. R. CIV. P. 23 & advisory committee's note (Proposed 2003), *available at* http://www.uscourts.gov/rules/congress0303.html.

138. To date, the Oklahoma Supreme Court's only significant commentary regarding the content of certification orders concerned the propriety of a "general order" denying class certification. *See* KMC Leasing, Inc. v. Rockwell-Standard Corp., 2000 OK 51, ¶ 13, 9 P.3d 683, 688. Ultimately, the court concluded that the hearing transcript and record in fact supported the trial court's conclusion that a surfeit of individual issues precluded a finding of predominance. *Id.* ¶ 13, 9 P.3d at 689.

139. Ysbrand v. DaimlerChrysler Corp., 2003 OK 17, ¶ 5, No. 97,469, 2003 WL 437160, at *2 (Feb. 25, 2003).

that devices like subclasses and issue classes can resolve management problems as they arise, rather than requiring trial courts to actually sketch out in advance how they would be used and how doing so would impact predominance and trial management.[140] As a result, it may appear to some that Oklahoma follows the "certify now and worry later" approach condemned by the Texas Supreme Court.[141]

Before concluding that Oklahoma's approach must signify a pro-certification bias, however, it is important to consider the role that standard of review might be playing. Class certification orders are reviewed for an abuse of discretion.[142] Unless the reviewing court characterizes the trial judge's ruling as the product of legal error,[143] the reviewing court must sustain the trial court's certification ruling unless the trial judge could not have rationally reached the decision under review.[144] While the predominance requirement must have some legal boundaries,[145] it is fundamentally a rule directed at judicial economy and efficiency — concerns that the Oklahoma Supreme Court seems strongly inclined to leave to the trial court's discretion:

> The discretion granted to the trial court on the certification issue leaves the decision as to what method of trial is most efficient primarily to the court that is in the best position to determine the facts of the case, to appreciate the consequences of alternative

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140. *See id.* ¶ 21, 2003 WL 437160, at *6. I address the use of issue classes and subclasses to resolve predominance problems in Part V.C. *infra*.

141. At the very least, the Oklahoma Supreme Court's class certification practices might be seen as manifesting laissez-faire certification characteristics consistent with that label.

142. *See Ysbrand*, ¶ 5, 2003 WL 437160, at *2; *KMC Leasing*, ¶ 10, 9 P.3d at 688.

143. Examples would include using the wrong certification standard, *see* Scoufos v. State Farm Fire & Cas. Co., 2001 OK 113, ¶ 1, 41 P.3d 366, 367, or making a substantive error regarding the content of the underlying claims, *see Ysbrand*, ¶ 18, 2003 WL 437160, at *5 (choice-of-law error led court to erroneously conclude that single law, rather than law of fifty-one states, would apply).

144. *See Ysbrand*, ¶ 5, 2003 WL 437160, at *2 (defining abuse of discretion to mean when "discretion is exercised to an end or purpose not justified by, and clearly against, reason and evidence")(quoting Patel v. OMH Med. Ctr., Inc., 1999 OK 33, ¶ 20, 987 P.2d 1185, 1194); *KMC Leasing*, ¶ 10, 9 P.3d at 688 ("An abuse of discretion occurs when a court has, 'based its decision on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling.") (quoting Mann v. Reynolds, 46 F.3d 1055, 1062 (10th Cir. 1995)).

145. In *Ysbrand*, for example, the court did not remand after concluding that the law of fifty-one jurisdictions would apply to the fraud claim, but instead held that "[a]pplying the law of [fifty-one] jurisdictions to the fraud claim presents an overwhelming burden which would make the class unmanageable and a class action determination of that claim inappropriate." *Ysbrand*, ¶ 18, 2003 WL 437160, at *5. In effect, the court concluded that it did not need to remand because it would be an abuse of discretion for the trial court to find predominance, thereby creating a tacit legal rule.

> methods of resolving the issues of the case and that is in the best position to select the most efficient method for their resolution.[146]

Thus, the Oklahoma Supreme Court's relatively lenient approach to predominance may simply reflect its hesitance to involve itself in a matter it sees as essentially one of case management.[147]

Whether Oklahoma's deferential model of provisional certification stems from the court's views on discretionary review, its underlying faith in the ability of trial courts to deal with management problems as they arise, or simply a lenient pro-certification view towards predominance, that model has important consequences for the parties and their lawyers. The available evidence indicates that most cases that are certified as class actions settle.[148] As one critic of provisional certification explains, "The stated premise of provisional certification is that the court can always decertify later if the [individual] issues complicate matters too much. But later never comes, and never will, because the cases always settle first — as judges know better than anyone."[149] Thus, the most direct and powerful consequence of a permissive certification framework is that it subjects more litigants to the peculiar dynamics of class action settlement.

Whether this hurts or helps plaintiffs or defendants as a whole is hard to say. The traditional view has been that class certification forces defendants to pay tribute for claims with marginal merit to avoid the risk of "bet the company" litigation.[150] It is also true, however, that class certification, by conferring a type of limited monopoly on class counsel to sell global preclusion and peace,[151] creates agency problems that might lead class counsel to "embrace a settlement inadequate for all, many, or some class members in

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146. *KMC Leasing*, ¶ 9, 9 P.3d at 688 (quoting Boughton v. Cotter Corp., 65 F.3d 823, 826 (10th Cir. 1995)).

147. Even as a function of discretionary review, however, the court's willingness to place faith in trial judges' abilities to make wise management decisions stands in stark contrast to the Texas Supreme Court's insistence that even management issues be scrutinized for "actual, not presumed, conformance with [Rule 23]." Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 691 (Tex. 2002) (quoting S.W. Ref. Co. v. Bernal, 22 S.W.3d 425, 435 (Tex. 2000)).

148. *See* Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rule-making Challenges*, 71 N.Y.U. L. REV. 74, 180 (1996).

149. Kramer, *supra* note 30, at 565.

150. *See In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298-99 (7th Cir. 1995) (discussing class action settlement pressures). *But see* Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1378 (2000) (contending that the notion of blackmail settlements may be overstated).

151. *See* Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 161 (2003); *see also* Rubenstein, *supra* note 91, at 419 (characterizing class actions as transactions in which rights to sue are bought and sold).

exchange for the prospect of obtaining a fee award."[152] Thus, class certification can also create an opportunity for the defendant to buy meritorious claims in bulk at an unwarranted discount.[153] One thing we can say, though, is that the lawyers who seek class certification — for purposes noble or otherwise — will gravitate towards those jurisdictions where certification is more likely. Thus, a permissive class certification framework subjects more litigants to the dynamics of class action settlement in two ways: first, by attracting more class actions; and, second, by granting certification in a greater percentage of those cases.

C. Achieving Predominance Through Subclasses and Issue Classes

Oklahoma courts have founded their decisions to affirm class certification, despite the presence of individual issues, in part on the ability of trial courts to create subclasses and issue classes.[154] While both devices are important in modern class action litigation, it remains unclear how they intersect with the section 2023(B)(3) predominance requirement.

The Oklahoma Supreme Court has cited the ability to subclass as a way of handling individual issues that might arise during the course of a class action. Courts typically subclass for two reasons. First, subclassing may be necessary to satisfy adequacy of representation because the full range of potential class members, if grouped together, would have conflicting interests.[155] Second, subclassing can be a valuable management tool to overcome superiority problems.[156] One example, discussed earlier, occurs when courts group the

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152. Nagareda, *supra* note 151, at 163; *see also* HENSLER ET AL., *supra* note 66, at 79 (discussing temptation for class counsel to collude with defense counsel).

153. Perhaps the most notorious example of this is the so-called "coupon settlement," in which class counsel receives a large attorneys' fee award while the class compensation consists solely of coupons towards future purchases from the defendant. *See* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1041 (2002) ("[C]oupon settlements raise the specter of unfaithful fiduciaries and of unsatisfactory settlements.").

154. *See* Ysbrand v. DaimlerChrysler Corp., 2003 OK 17, ¶ 21, No. 97,469, 2003 WL 437160, at *6 (Feb. 25, 2003).

155. *See* 5 MOORE'S FEDERAL PRACTICE, *supra* note 2, § 23.05[2] (subclassing appropriate when groups within proposed class have adverse interests); 7B WRIGHT ET AL., *supra* note 21, § 1790, at 276 ("The usual situation in which a court will divide a class into subclasses under Rule 23(c)(4)(B) is when the class is found to have members whose interests are divergent or antagonistic."); *see also, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 856 (1999) (subclassing between present and future claimants required to eliminate conflict of interest); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626 (1997) (finding that class action "on behalf of giant class rather than on behalf of a single discrete subclasses" resulted in intraclass conflicts undermining the Rule 23(a)(4) requirement of adequacy of representation).

156. *See In re* St. Jude Med., Inc. Silzone Heart Valves Prods. Liab. Litig., No. MDL 01-

laws of the different states into categories and then subclass according to those groupings to make the class more manageable.[157] Whether it is used to resolve conflicts of interest or management problems, the essence of the subclass is that it sorts a large and superficially homogenous group into smaller groups that more accurately reflect the differences between them. This can facilitate predominance in the sense that the members of the subclass, having been sorted according to a secondary common trait, now can claim one more thing in common.[158]

Subclassing is inherently limited as a predominance tool, however, because it has no effect on the need for individual issue adjudication. If the individual class members need to prove an issue individually — reliance, for example — subclassing does not change that. Even if the court could sort the class members into groups based on various theories of reliance, each class member in each group would still need to present individual proof of reliance. Indeed, for truly individual issues, subclassing provides no help because each subclass — properly defined *as to that issue* — would consist of a single class member.[159] Second, subclassing has secondary consequences for certification. Each subclass must independently satisfy the requirements for class certification.[160] Thus, because each subclass needs to independently satisfy numerosity, the idea that courts can use subclasses to isolate "problematic"

1396 JRT/FLN, 2003 WL 1589527, at *10 (D. Minn. Mar. 27, 2003) ("The Court finds that the superiority requirement can be met, and certification granted under Rule 23(b)(3) to various subclasses of the relevant causes of action."); *see also* 7B WRIGHT ET AL., *supra* note 21, § 1790, at 283-84 (discussing use of subclasses to make class treatment manageable).

157. *See supra* note 30; *see, e.g.*, *In re* Telectronics Pacing Sys., Inc., 172 F.R.D. 271, 293-94 (S.D. Ohio 1997) (accepting plaintiffs' proposed strict liability subclasses as both accurate distillations of the substantive law and manageable litigation packages that meet the superiority requirement).

158. From this perspective, it is perhaps most accurate to view subclassing as a technique that takes a single group with one common issue and splits it into several smaller groups, each with two or more common issues. In *Ortiz v. Fibreboard*, for example, the U.S. Supreme Court held that the class of persons exposed to asbestos should have been subclassed, at minimum, to separate class members with present injuries from those whose claims might arise in the future. *Ortiz*, 527 U.S. at 856. The original class had the common issue of asbestos exposure; the respective subclasses would have had the multiple common issues of exposure and injury status.

159. Relatedly, a court might create a subclass for all class members who appear to have substantial individual issues. *See, e.g.*, Smilow v. S.W. Bell Mobile Sys., Inc., 323 F.3d 32, 40 (1st Cir. 2003) (suggesting the possibility of using subclasses to address the potential that some class members may have statute of limitations problems). While doing so might repackage the class action in a way that makes class treatment seem more manageable, it does not alter the fact that each class member within that subclass may require individual proof, and therefore does not alter the ultimate mix of common versus individual issues.

160. *See* 5 MOORE'S FEDERAL PRACTICE, *supra* note 2, § 23.05[2].

class members is suspect.[161] Moreover, extensive subclassing can create manageability problems that undermine the superiority requirement.[162] Therefore, a legitimate question exists as to whether the availability of subclassing supports a deferential approach to predominance when substantial individual issues appear to cloud the trial horizon.

The Oklahoma Supreme Court has also identified the issue class as a way trial courts can deal with individual issue problems that might arise after certification.[163] Under section 2023(C)(4)(a), "[A]n action may be brought or maintained as a class action with respect to particular issues."[164] The Oklahoma Supreme Court, however, has not offered any specific insight on how the issue class can solve individual issue problems. As discussed below, the answer may depend on unresolved questions regarding the proper usage of the issue class itself.

An examination of issue class usage under Federal Rule of Civil Procedure 23(c)(4)(A) — after which section 2023(C)(4)(a) is modeled — both explains what an issue class is and reveals an important case split regarding the usage of issue classes to solve predominance problems. Under Rule (c)(4)(A), a court may certify only certain issues for class treatment.[165] In a products liability suit, for example, the trial court might certify the issue of product defect for class treatment, but not certify the more individualized issues of causation or damages. Typically, issue class certification is accompanied by an order bifurcating the trial into stages, in which the parties litigate the common issues first while reserving proof on individual issues for later.[166]

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161. *See* KMC Leasing, Inc. v. Rockwell-Standard Corp., 2000 OK 51, ¶ 18, 9 P.3d 683, 689 (finding that plaintiff's proposed subclasses failed numerosity); *see also* MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.15 (1995) ("If too many subclasses are sought, some may not contain enough members to satisfy the numerosity requirement.").

162. *See In re* Ford Motor Co. Ignition Switch Prods. Liab., 174 F.R.D. 332, 352 (D.N.J. 1997) (finding that the use of subclasses to account for differences in model, year, and applicable law would cause the suit to "quickly devolve into an unmanageable morass of divergent legal and factual issues"). According to one commentator, courts that advocate subclassing based on groupings of laws may be miscalculating the management benefits by dramatically underestimating the number of subclasses that might be required. *See* Coffee, *supra* note 20, at 396 (describing a scenario where only a handful of variables would still require eighteen subclasses); *see also, e.g., In re Ford Motor Co.*, 174 F.R.D. at 352 (calculating that subclassing might require as many as 8000 subclasses).

163. *See* Ysbrand v. DaimlerChrysler Corp., 2003 OK 17, ¶ 21, No. 97,469, 2003 WL 437160, at *6 (Feb. 25, 2003).

164. 12 OKLA. STAT. § 2023(C)(4)(a) (2001); *see also* FED. R. CIV. P. 23(c)(4)(A).

165. *See* MANUAL FOR COMPLEX LITIGATION (THIRD), *supra* note 161, § 30.17 ("[A] class may be certified for only certain issues or claims in the litigation."); 7B WRIGHT ET AL., *supra* note 21, § 1790, at 271-74 (describing types of issue classes that have been certified).

166. *See* FED. R. CIV. P. 42(b) (authorizing bifurcated trials); *see also* Laura J. Hines,

Assuming that the class members prevailed on their common issues, they would then split up for the ultimate disposition of their claims.[167] The named plaintiffs would proceed to final judgment in that court. The absent class members, however, would no longer have a case pending before that court; to obtain a final judgment, they would need to pursue individual suits using the classwide ruling for its preclusive effect.[168]

While the courts and commentators agree that (c)(4)(A) supports the certification of issue classes, they disagree on the relationship between it and the (b)(3) predominance requirement. Some courts evaluate predominance in an issue class solely with respect to the part of the case that is classed.[169]

Challenging the Issue Class Action End-Run, 52 EMORY L.J. (forthcoming 2003) (discussing phased issue classes); 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, 265 (same). The benefits of bifurcating an issue class would be the same as with bifurcation of simple litigation under Federal Rule 42(b) — judicial efficiency and improved comprehension. The efficiency gains stem from the chance that the trial will end after the first phase, either because of a defense win or because the phase one verdict leads the parties to settle. *See* Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705, 772 (2000). The comprehension benefits flow from the fact that the jury will be able to focus on the particular issue at hand, rather than try to recall, sift through, and assess evidence on all of the issues of the case at the same time. *See id.* at 751.

167. *See* Simon v. Philip Morris Inc., 200 F.R.D. 21, 29-30 (E.D.N.Y. 2001) (discussing mechanics of issue class utilizing separate juries). Later in *Simon*, Judge Weinstein summarized the proposed issue class proceedings as follows:

> If the jury returns a verdict favorable to the defendants the case will come to a sudden stop. In the event of an affirmative verdict on the common issue of general compensatory liability, the individual compensation claims of each class member not decided in [the] court would then be transferred to appropriate federal district courts throughout the country for decisions on such issues as individual causation, individual damages and individual statutes of limitations defenses.

Id. at 50; *see also* Romberg, *supra* note 166, at 262 (discussing stages and proceedings when court employs an issue class).

168. *See In re* Am. Honda Motor Co. Dealer Relations Litig., 979 F. Supp. 365, 366, 368-69 (D. Md. 1997).

169. *See, e.g.*, Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996) ("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."); *Simon*, 200 F.R.D. at 29-30 (examining the history and policy of issue classes and concluding that the court could assess predominance on an issue-by-issue basis). This view finds substantial support in the leading treatises. *See* 2 CONTE & NEWBERG, *supra* note 3, § 4:23; 7A WRIGHT ET AL., *supra* note 21, § 1778, at 546 (advocating use of issue classes where common issues do not predominate overall because "[t]he effect may be to make the common issues in the recast class action 'predominate' for purposes of Rule 23(b)(3)); 7B WRIGHT ET AL., *supra* note 21, § 1790.

From that vantage point, however, the common issue will always predominate because those are the only issues that are part of the calculus — all of the individual issues are set apart for later individual adjudication.[170] For this reason, other courts have rejected that approach as an end run around predominance.[171] Rather, they hold that an issue class may be certified only if the common issues predominate over individual issues for the dispute as a whole package, including the individual issues that the absent class members will have resolved in other suits.[172]

At this time, no published Oklahoma decision has discussed the relationship between section 2023(B)(3) predominance and section 2023(C)(4)(a) issue classes under Oklahoma's class action rule. How section (C)(4)(a) is interpreted, however, will greatly impact the propriety of invoking it at the class certification stage. On the one hand, Oklahoma might follow the view articulated by the Ninth Circuit and Judge Weinstein that, when an issue class is proposed, predominance is measured solely in relation to the issues that are proposed for class treatment. If this is the case, then it would be logically valid to conditionally certify problematic class actions in reliance on section (C)(4)(a) because the court could manufacture predominance at any time by limiting the scope of classwide treatment to include only those issues that turn out to be amenable to classwide proof.[173] On the other hand, Oklahoma might follow the Fifth Circuit and hold that predominance must be measured against all issues in the dispute, regardless of whether they are to be classed. In that case, it would be inappropriate to rely on the possibility of creating issue classes — either at the time of the certification hearing or later in the suit —

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170. *See* 2 CONTE & NEWBERG, *supra* note 3, § 4:23 ("When a court decides to limit a class action . . . to particular common issues only, such limitation will necessarily afford predominance as to those issues."); Romberg, *supra* note 166, at 289 ("For many years following the 1966 amendments to Rule 23, the dominant (if relatively unexplored) position of courts and commentators was that certifying only the common issues in a case automatically resulted in predominance . . . .").

171. *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996) ("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) . . . ."); Arch v. Am. Tobacco Co., 175 F.R.D. 469, 496 (E.D. Pa. 1997) ("Plaintiffs cannot read the predominance requirement out of (b)(3) by using (c)(4) to sever issues until the common issues predominate over the individual issues."), *aff'd*, 161 F.3d 127 (3d Cir. 1998).

172. For a comprehensive survey of how the federal courts have interpreted Federal Rule 23 (c)(4) during the last several years, see Hines, *supra* note 166, Part III.C.

173. *See* Hannah Stott-Bumsted, Note, *Severance Packages: Judicial Use of Federal Rule of Civil Procedure 23(c)(4)(A)*, 91 GEO. L.J. 219, 235 (2002) (discussing intersection of (c)(1) conditional certification and (c)(4)(A) issue classes).

since any such issue classes would have no bearing on whether the common issues predominated over the individual issues in the dispute as a whole.[174]

VI. Conclusion

Class action critics complain that, under current practice, class plaintiffs shop to find the state courts with the least demanding certification standards.[175] At this point, Oklahoma can be viewed as a less demanding jurisdiction, as least insofar as it has declined to follow the trend towards erecting barriers to satisfying the predominance requirement. As detailed above, Oklahoma's treatment of choice of law, the impact of individual issues, and certification metholdology all tend to preserve the possibility of class certification rather than to foreclose it.

This is not to say that Oklahoma courts must protect the state's borders from forum-shopping plaintiffs by adopting more stringent certification standards. Oklahoma courts should adopt certification standards that best implement Oklahoma class action policy, whatever it might be. It is nevertheless important to recognize that, in our federal system, policy choices can have forum-shopping consequences. And in this case, the cumulative effect of Oklahoma case law under section 2023(B)(3) may well be to make Oklahoma a more desirable forum for national state law class action litigation.

174. As with subclasses, however, the use of issue classes can be relevant to (b)(3)'s superiority requirement. *See* 7B WRIGHT ET AL., *supra* note 21, § 1790, at 268-69 (discussing use of issue classes to solve manageability problems that otherwise might prevent class treatment from being superior to the litigation alternatives).

175. *See* Beisner & Miller, *supra* note 66, at 155. Pending legislation would amend the diversity statute, 28 U.S.C. § 1332, to confer federal subject matter jurisdiction over state law class actions based on minimal diversity and the aggregate amount in controversy. *See* Class Action Fairness Act of 2003, H.R. 1115, 108th Cong. § 4 (2003); Class Action Fairness of Act of 2003, S. 274, 108th Cong. § 4 (2003). This legislation, should it pass, would mitigate the impact of class action procedure differences among the states because more class actions could be filed in (or, more likely, removed to) federal court, where certification would be governed by Federal Rule 23.