Report on Class Certification for Particular *Issues* Pursuant to Federal Rule of Civil Procedure 23(c)(4)(A)

I. Introduction

This report analyzes the Second Circuit's recent decision, *In re Nassau County Strip Search Cases*, 461 F.3d 219 (2d Cir. 2006), and its impact on case law in other jurisdictions regarding the parameters of Federal Rule of Civil Procedure ("FRCP") 23(c)(4)(A). FRCP 23(c)(4)(A) provides: "When appropriate [] an action may be brought or maintained as a class action with respect to particular *issues*. . . ." (emphasis added). The question that follows from this language is how broadly or narrowly do courts interpret the term "issue" for the purpose of certification.

Analysis of court decisions from various jurisdictions sets forth the so-called "split" among the courts. The "split" has arisen from Fifth Circuit dicta enunciated in a footnote, which interpreted "issue" narrowly to mean a claim or cause of action as a whole within a lawsuit. Other jurisdictions, however, have applied FRCP 23(c)(4)(A) more broadly to include certification of a class with respect to particular issues, including subject matters that are not, by themselves, causes of action. *Valentino v. Carter-Wallace, Inc.* 97 F.3d 1227 (9th Cir. 1996). Some courts have permitted the use of FRCP 23(c)(4)(A) to certify a class with respect to an element within a claim where such element is dispositive. *See Endo v. Albertine*, 147 F.R.D. 164, 173 (N.D. Ill. 1993)(allowing certification pursuant to FRCP 23(c)(4)(A) to certify a class with respect to the element of materiality of a misrepresentation in a § 12(2) claim).[1] However, no court has interpreted "issue" to mean the entire lawsuit. *See Gunnells v. Healthplan Servs. Inc.*, 348 F.3d 417, 443 (4th Cir. 2003)("no court has required a *lawsuit*-specific predominance analysis").

Whether the various decisions of the courts regarding the breadth of FRCP 23(c)(4)(A) truly establish a "split" among the Circuits, or are, in reality, much ado about nothing remains to be seen. This is particularly interesting when one considers the underlying analysis supporting the rulings. The fact of the matter is that regardless of how courts interpret "issue," they analyze the question against the same test: Would the certification of particular issues pursuant to FRCP 23(c)(4)(A) advance the litigation or reduce the complexity of the issues?

II. History of Applying FRCP 23(c)(4)(A)

Long before the Second Circuit's recent interpretation of "issue" in the context of FRCP 23(c)(4)(A) in *In re Nassau*, other courts had already grappled with this issue. *See, e.g., In re Tetracycline Cases*, 107 F.R.D. 719 (W.D. Mo. 1985); *Central Wesleyan College v. W.R. Grace & Co.* 6 F.3d 177 (4th Cir. 1993); *Gunnells,* 348 F.3d 417; *Harding v. Tambrands Inc.*, 165 F.R.D. 623 (D. Kan. 1996). One decision—*In re Tetracycline*—led the way in formulating a test to address the scope of FRCP 23(c)(4)(A); other courts have followed this test in considering the application of FRCP 23(c)(4)(A).

A. Leading the Way: *In re Tetracycline*

In 1985, the test for deciding whether to apply FRCP 23(c)(4)(A) to certify "particular issues" for class treatment was first enunciated in *In re Tetracycline*, 107 F.R.D. at 733. There, plaintiffs who suffered tooth discoloration as a result of the ingestion of Tetracycline sought class certification for their claims against the drug manufacturer. *Id.*

In deciding whether to certify certain issues pursuant to FRCP 23(c)(4)(A), the court articulated the following:

> If the requirement under Rule 23(c)(4)(A) was not only that there be one or more issues which met the Rule 23(a) tests for commonality, typicality and adequacy of representation, but also that those issues "predominate," in the usual Rule 23(b) sense, when compared with *all* the issues in the case, there would obviously be no need or place for Rule 23(c)(4)(A). Reference to the general rules of construction suggests that any interpretation which makes a federal rule superfluous is to be avoided. I believe, accordingly, that the appropriate meaning of Rule 23(b)'s predominance requirement, as applied in the context of a partial class certification request under Rule 23(c)(4)(A), is simply that the issues covered by the request be such that their resolution (as a class matter) will materially advance a disposition of the litigation as a whole.

Id. at 727 (citation omitted). Applying that test, the court denied plaintiffs' motion for class certification of issues of causation, liability relating to the marketing and sale of Tetracycline, and damages. *Id.* at 736. Considering the problems of manageability relating to warnings by individuals doctors and knowledge of individual patients, problems allocating fault to individual physicians, the difficulties of maintaining a punitive damages claim, and the fact that a large number of individual issues would remain, the court concluded that the issues raised for class certification "would not, even when appropriately defined and restated, significantly advance this litigation or reduce the complexity of the

individual issues remaining for later determination." *Id.* at 733–35. Nevertheless, the court recognized the position that a court "always should consider the possibility of determining particular issues on a representative basis as permitted by Rule 23(c)(4)(A) . . . whenever that might prove efficient and economical." *Id.* at 727 (*quoting* 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE 57 (1972)).

B. Decisions Since *In re Tetracycline*

Since the *In re Tetracycline* decision, how courts in various circuits interpret and apply FRCP 23(c)(4)(A) to certify a class with respect to "particular issues" seems to focus more on an analysis of the "advance the litigation" test, set forth in *In re Tetracycline*, rather than on any hard and fast rule.

1. Ninth Circuit

On the heels of the *In re Tetracycline* decision, the Northern District of California decided *In re Activision Sec. Litig.*, 621 F. Supp. 415 (N.D. Cal. 1985). There, following various motions to dismiss, plaintiffs sought class certification of a plaintiffs' class with respect to their § 11 and § 12(2) of the Securities Act of 1933 claims, as well as state common law claims of fraud, deceit, and negligent misrepresentation. *Id.* at 419. Plaintiffs also moved for class certification of a defendant class as to their § 11 claim as well as with respect to a single issue of whether a registration statement and prospectus contained materially misleading statements or omissions pursuant to § 12(2). *Id.* at 427. The court granted class certification as to all of these claims. *Id.* at 439.

Addressing the single § 12(2) issue of whether the registration statement and prospectus contained material misstatements or omissions, the court held that it was "appropriate and desirable to certify a defendant class of underwriters to litigate the single issue under § 12(2) of material misrepresentations and omissions in the offering materials." *Id.* at 438. The court reasoned that the express language of FRCP 23(c)(4)(A) "imposes a duty on the court and gives it ample power to 'treat common things in common and to distinguish the distinguishable.'" *Id.* (*quoting* 7A CHARLES ALAN WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1790). The court explained how FRCP 23(c)(4)(A)'s application would advance the litigation: "[s]ince subdivision (c)(4) is designed to give the court maximum flexibility in handling class actions, its proper utilization will allow a Rule 23 action to be adjudicated that otherwise might have had to be dismissed or reduced to a nonrepresentative proceeding because it appears unmanageable." *Id.* at 438.

The next year, the same court decided *In re Computer Memories Sec. Litig.*, 111 F.R.D. 675 (N.D. Cal. 1986). In that case, plaintiffs' complaint contained claims pursuant to §§ 11 and 12(2) of the Securities Act of 1933, § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. The complaint also contained common law fraud, deceit and negligent misrepresentation claims. *Id.* at 679.

Plaintiffs moved for class certification of a plaintiffs' class and two defendant classes with respect to those claims. *Id.* at 679. As to the defendants' class, plaintiffs sought class certification regarding their § 12(2) claim only with respect to the issue of whether the registration statement and prospectus contained material misstatements or omissions. *Id.* at 687. The court granted all of plaintiffs' motions. *Id.* at 689. However, because of typicality and adequacy concerns regarding the proposed class representative, the court limited class treatment of the plaintiffs' § 12(2) claim to the issue of whether the registration statement and prospectus contained material misrepresentations or omissions under FRCP 23(c)(4)(A) and noted that: "The Federal Rules of Civil Procedure authorize certification of a class to litigate particular issues, as opposed to entire claims." *Id.* at 681 & n.4 (*citing In re Activision,* 621 F. Supp. at 438).

In 1996, the Ninth Circuit decided *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996). There, plaintiffs brought a products liability action against manufacturers of an epilepsy drug. The district court certified the class pursuant to FRCP 23(c)(4)(A) as to several issues, including "strict liability, negligence, failure to warn, breach of implied and express warranty, causation in fact, and liability for punitive damages," finding that the predominance requirement was met as to those issues. *Id.* at 1229. The district court excluded from certification what it deemed to be individual issues of proximate cause, compensatory damages, and the amount of punitive damages, finding they did not meet the predominance or superiority requirements of FRCP 23(b)(3). *Id.* at 1229.

On appeal, the Ninth Circuit concluded that the district court abused its discretion. *Id.* at 1230. Invoking the "advancement of the litigation" concept, the Ninth Circuit criticized the district court for its failure to "discuss whether the adjudication of the certified issues would significantly advance the resolution of the underlying case, thereby achieving judicial economy and efficiency." *Id.* at 1229. The Ninth Circuit vacated the district court's ruling because "there has been no demonstration of how this class satisfied important Rule 23 requirements, including the predominance of common issues over individual issues and the superiority of class adjudication over the other litigation alternatives" and remanded the case for further proceedings. *Id.* at 1230. However, the court stated, "[e]ven if the common questions do not predominate over the individual questions so that class certification of the entire action 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." *Id.* at 1234.

2. Seventh Circuit

In 2005, the Northern District of Illinois decided *In re Factor VIII or IX Concentrate Blood Prods. Litig.,* No. 93 C 7452, WL 497782 (N.D.Ill. Mar. 1, 2005). Although the court declined to certify a class pursuant to FRCP 23(c)(4)(A) with respect to negligence issues, it recognized the "advance the litigation" concept, stating that "[e]ven though a court decides that the common questions do not predominate for purposes of Rule 23(b)(3) . . . the court always should consider the possibility of determining particular issues on a representative basis as permitted by Rule 23(c)(4)(A) . . . whenever that might prove efficient and economical." *Id.* at *2 (citation omitted)(alterations in original).

One week later, the Seventh Circuit decided *In re Allstate Ins. Co.*, 400 F.3d 505 (7th Cir. 2005). There, the district court certified the class with respect to an ERISA claim under FRCP 23(b)(2). *Id.* at 506. The Seventh Circuit vacated the district court's decision, finding that certification under FRCP 23(b)(2) was improper. *Id.* at 508. However, the court stated that the issue of whether defendants had a policy of forcing employees to quit could be certified pursuant to FRCP 23(c)(4)(A), as that would advance the litigation rather than "litigating the class-wide issue of Allstate's policy anew in more than a thousand separate lawsuits." *Id.* Accordingly, the court concluded "that this class action should have been certified, if at all, under Rule 23(b)(3), rather than under (b)(2)." *Id.*[2]

3. Fifth Circuit

In 1996, the Fifth Circuit confronted the scope of FRCP 23(c)(4)(A). *Castano v. Am. Tobacco Co.,* 84 F.3d 734 (5th Cir. 1996). Plaintiffs brought an action on behalf of all smokers and nicotine-dependent persons against tobacco companies. The district court organized the class action into four categories consisting of: (1) "core liability"; (2) causation, reliance, affirmative defenses; (3) compensatory damages; and (4) punitive damages. *Id.* at 739.

The district court then certified the class with respect to "core liability" and punitive damages. The circuit court reversed and chastised the lower court for failing to conduct any analysis regarding its finding of predominance. Specifically, *Castano* noted the absence of any consideration of the impact on predominance of questions, such as variations in state law and the necessity of individualized proof of reliance, as well as the superiority of the class action.

The *Castano* court, like other courts that considered FRCP 23(c)(4)(A), sought to determine if class certification would advance the litigation. The fact that certain common issues might arise in a multitude of individual actions does not mandate class-wide treatment. *Id.* at 744–45. Indeed, because of the threat of duplicative jury findings in both the proposed class trial and subsequent individual trials, the *Castano* court concluded that the plaintiffs failed to meet their predominance burden. *Id.* at 745, 749–50. The court went even further stating in *dicta* that "[t]he proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for class trial." *Id.* at 745 n.21. Further, "[r]eading rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3)." *Id.*[3] Despite the fact that the footnote was completely unnecessary to the resolution of the case, it has gained prominence as a "holding" by other courts considering this issue, and is what underlies the purported "split."

4. Fourth Circuit

In 1993, the Fourth Circuit affirmed the district court's decision to conditionally certify a class with respect to eight particular issues in the discovery phase of an asbestos litigation. *Central Wesleyan College v. W.R. Grace & Co.,* 6 F.3d 177, 180–81 (4th Cir. 1993). In so doing, the court recognized that "Rule 23(c)(4)(A) specifically allows an action to be maintained 'as a class action with respect to particular *issues*.'" *Id.* at 185 (citation omitted)(emphasis added). In that case, some of the "particular issues" included "the state of the art" issue, "whether defendants participated in conspiratorial activities," and "whether defendants breached a duty of care." *Id.* at 184. In affirming the district court's decision, the Fourth Circuit found that "the class mechanism may advance this action and reduce the need for repetitive litigation in this area." *Id.* at 180. Once again, the "advance the litigation" test prescribed the scope of FRCP 23(c)(4)(A).

Ten years later, in 2003, the Fourth Circuit decided *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417 (4th Cir. 2003). There, plaintiffs brought claims against a third-party administrator of a health care plan and against individual agents responsible for selling the plan. *Id.* at 421. The district court certified a plaintiffs' class on a single claim against the defendant third-party administrator for the violation of its duties. *Id.* at 424–25. Additionally, the district court certified several subclasses with respect to liability issues against the agents. *Id.* at 434.

The Fourth Circuit affirmed the district court's decision as to the third-party administrator because it found that common questions predominated over individual questions as to liability. *Id.* at 428. However, the Fourth Circuit reversed the district court's certification with respect to the agents because it determined that the predominance and commonality requirements could "only be established after considerable individual inquiry." *Id.* at 434. Specifically, because the claims against the agents involved fraud, reliance was an issue and, therefore, common issues could not predominate because "a fraud class

action cannot be certified when individual reliance will be an issue." *Id.* at 435 (*quoting Castano,* 84 F.3d at 745).

In its analysis of FRCP 23(c)(4)(A), the court stated:

> [P]recedent from our own court flatly rejects the dissent's sequential interpretation of Rule 23. In *In re A.H. Robins [Co., Inc.]*, 880 F.2d [709] at 740 [4th Cir. 1989], we counseled that "courts should take full advantage of the provision in subsection (c)(4) permitting class treatment of separate issues in the case." We expressly recognized that "*if* [*an*] *action includes multiple claims, one or more of which might qualify as a certifiable class claim, the court may separate such claims* from other claims in the action *and certify them* under the provisions of subsection (c)(4)," provided that "each subclass must independently meet all the requirements of (a) and at least one of the categories specified in (b)." *Id.* at 728 (emphasis added). Thus, contrary to the dissent's protests in this case, we do not espouse a new rule. Rather we follow the rule articulated in *A.H. Robins*—that subsection 23(c)(4) should be used to separate "one or more" claims that are appropriate for class treatment, provided that within that claim or claims (rather than within the entire lawsuit as a whole), the predominance and all other necessary requirements of subsections (a) and (b) of Rule 23 are met.

Gunnells, 348 F.3d at 441 (some alterations in original).

Citing to *Robinson v. Metro-North Commuter R.R. Co.,* 267 F.2d 147 (2d Cir. 2001) as well as *Valentino v. Carter-Wallace, Inc.* 97 F.3d 1227 (9th Cir. 1996), the court examined what it characterized as the "circuit conflict" as to "whether predominance must be shown with respect to an entire cause of action, or merely with respect to a specific issue, in order to invoke (c)(4)." *Gunnells*, 348 F.3d at 444. However, the court concluded that it had "no need to enter that fray . . . because . . . [p]laintiffs' *cause of action* as a whole . . . satisfies the predominance requirements of Rule 23. *Id.* Thus, the court never reached the issue regarding the full breadth of FRCP 23(c)(4)(A).[4]

5. Sixth Circuit: Western District of Michigan

In 1998, the Western District of Michigan was asked to certify a nationwide class on plaintiffs' "core theory" relating to fraudulent inducement. *See In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 183 F.R.D. 217, 224–25 (W.D Mich. 1998). Although the court recognized *Valentino*'s holding regarding the use of FRCP 23(c)(4)(A) "to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues," (*id.* at 224 (*quoting Valentino*, 97 F.3d at 1234)), it cautioned against using FRCP 23(c)(4)(A) to "manufacture predominance." *Id.* at 224–25 (*citing Castano*, 84 F.3d at 745 n.21). The court ultimately applied the *Tetracycline* test and concluded that, even if it were to certify the class for specific issues, it would not advance the litigation: "even a jury determination favorable to plaintiffs at this step would not in itself justify a finding of liability on any claim. A second jury would still be required to determine [defendant]'s ultimate liability. . . . In such a situation the second jury could find itself impermissibly reconsidering the findings of the first jury." *Id.* at 225.

6. Tenth Circuit: District of Kansas

In *Harding v. Tambrands Inc.*, 165 F.R.D. 623 (D. Kan. 1996), plaintiffs brought a products liability action against tampon manufacturers for damages suffered as a result of contracting Toxic Shock Syndrome allegedly from the use of their products. The *Harding* plaintiffs requested that the court certify any individual issues it deemed fit to certify. *Id.* at 632. Citing *In re Tetracycline*, the *Harding* court agreed that the test for certifying "particular issues" pursuant to FRCP 23(c)(4)(A) is that: "[t]he issues must be such that their resolution as a class matter would materially advance the disposition of the litigation as a whole." *Harding*, 165 F.R.D. at 632 (*citing In re Tetracycline*, 107 F.R.D. at 727). Applying that test, the court declined to certify a class on any issue, or as a whole. The court found that the non-common issues of general causation within the proposed class, including whether plaintiffs' contraction of Toxic Shock Syndrome was caused by using defendants' products, were "inextricably entangled with the common issues." *Id.* Accordingly, the court concluded that resolution of the potentially common issues would not materially advance the litigation. *Id.*

In *Emig v. Am. Tobacco Co., Inc.*, 184 F.R.D. 379 (D. Kan. 1998), the court confronted the issue of whether to certify a class of smokers suing the American Tobacco Company with respect to particular claims such as negligence, strict liability, and breach of the implied warranties. The court articulated application of FRCP 23(c)(4)(A) as: "when common questions do not predominate when compared to all questions that must be adjudicated to dispose of a suit, Rule 23(c)(4) asks whether a suit limited to the unitary adjudication of a particular common issues [sic] will achieve important and desirable advantages of judicial economy and efficiency." *Id.* at 395 (*quoting* 1 NEWBERG ON CLASS ACTIONS § 4.25, at 4-81 (3d ed. 1992)). Applying the *Harding* test, the court denied plaintiffs' motion for certification of particular issues because it would not "materially advance the litigation as a whole." *Id.*

7. Eleventh Circuit: Middle District of Florida

Whether to allow class certification pursuant to FRCP 23(c)(4)(A) with respect to seventeen issues regarding

willfulness, causation, and legal defenses that plaintiffs claimed predominated their suit for strict product liability, negligence, negligent infliction of emotional distress, and toxic trespass was the question presented in *Rink v. Cheminova, Inc.*, 203 F.R.D. 648 (M.D. Fla. 2001). Although the court disagreed with the Magistrate's report and recommendation to the extent that it differed from the court's views as to the correctness of the *Castano* rationale, it nevertheless agreed with the Magistrate to the effect that class treatment of the common issues would not measurably advance the litigation. *See id.* at 653, 670.

8. Third Circuit: Eastern District of Pennsylvania

In 2004, the Eastern District of Pennsylvania confronted the application of Rule 23(c)(4)(A) to certify the issue of whether a proposition regarding NCAA eligibility rules intentionally discriminated against plaintiffs—a group of African American and/or dyslexic student-athletes. *Pryor v. Nat'l Collegiate Athletic Ass'n*, No. Civ. A. 00-3242, 2004 WL 1207642, at *4 (E.D. Pa. Mar. 4, 2004). The court agreed with plaintiffs' articulation that "in order to grant partial certification under Rule 23(c)(4)(A), [plaintiffs] need only show that . . . the Rule 23(b)(3) predominance requirement ha[s] been met with regard to the limited issues plaintiffs seek to certify." *Id.* at *2. With that predicate, the court noted that "[t]he underlying philosophy of Rule 23(c)(4)(A) . . . is that the advantages and economies of adjudicating issues that are common to the entire class on a representative basis should be secured even though other issues in the case may have to be litigated separately by each class member." *Id.* at *5. The court then applied the *Tetracycline* test, and determined that certification would not materially advance the litigation. Accordingly, plaintiffs' motion was denied. *Id.* at *6.

9. Second Circuit

The scope of FRCP 23(c)(4)(A) was addressed by the Second Circuit for the first time in 2001, in *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001). There, plaintiffs sought, among other relief, to bifurcate and certify the liability stage of their pattern-or-practice claim in an employee race discrimination action. *Id.* at 167. In reviewing the district court's denial of certification, the Second Circuit considered both Fifth Circuit case law that had rejected a similar claim for certification (*Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998)(*citing Castano*, 84 F.3d 734), *id*. at 167 n.12), as well as Ninth Circuit case law that supported certification of particular issues (*Valentino v. Carter-Wallace*, *Inc.* 97 F.3d 1227 (9th Cir. 1996)). *Id.* However, like the court in *Gunnells*, the Second Circuit refused to "enter the fray" and declined to decide the full scope of FRCP 23(c)(4)(A). *Id.* Nevertheless, the court applied the *Tetracycline* test and held "litigating the pattern-or-practice liability phase for the class as a whole would both reduce the range of issues in dispute and promote judicial economy"—i.e., it would advance the litigation. *Id.* at 168. Accordingly, the Second Circuit vacated the denial of class certification with instructions to certify the claim. *Id.* at 154.

III. Analysis of Second Circuit's Decision in *In re Nassau*

In its most recent decision, *In re Nassau County Strip Search Cases*, the Second Circuit decided, as an issue of first impression, the scope of FRCP 23(c)(4)(A) with respect to a particular issue, where a claim has not met the predominance requirement of FRCP 23(b)(3). 461 F.3d 219, 225 (2d Cir. 2006). The Second Circuit held that a court may apply FRCP 23(c)(4)(A) to certify a class as to a particular *issue* even when the entire claim has not met the predominance test. *Id.* at 221.

A. Background

Plaintiffs-arrestees initiated an action against Nassau County and others, alleging that the County's blanket policy to strip search all newly admitted misdemeanor detainees was unconstitutional. Plaintiffs, who were subject to these strip searches, sought a declaration that the policy was unconstitutional, damages, and an injunction. *Id.* at 222.

Plaintiffs moved to consolidate and certify a class pursuant to FRCP 23(b)(3). *Id*. The district court granted consolidation, but denied class certification based on a lack of predominance. *Id.* While the district court noted the possibility of *sua sponte* certification of a class solely on the issue of liability pursuant to FRCP 23(c)(4)(A), it referred to *Castano* as holding that a court may not use FRCP 23(c)(4)(A) "to single out the issue of liability for class treatment unless the 'cause of action, *as a whole*,' first satisfies Rule 23(b)(3)'s predominance requirement." *Id.* at 223 (*quoting Castano*, 84 F.3d at 745 n.21). Plaintiffs subsequently modified their class definition and moved for reconsideration. *Id.* Despite the fact that the district court agreed that the new class "removes the possibility of individualized liability determinations," it denied plaintiffs' motion. *Id. (quoting O'Day v. Nassau County*, No. 0:99-CV-2844-DRH, slip op. (May 23, 2001)).

Thereafter, plaintiffs again redefined their class and renewed their class certification motion as to liability. *Id.* In opposing the motion, defendants conceded that the common issue of whether the strip search policy was constitutional "might be appropriate for class certification." *Id.* at 224 *(quoting O'Day v. Nassau County*, No. 0:99-CV-2844-DRH, slip op. (May 23, 2001)). However, the district court again denied the motion concluding that defendants' concession removed all common liability issues from its predominance analysis leaving only the issue of liability as an individual one. *Id.* Although the parties later settled, plaintiffs reserved their rights to appeal the district court's denial of class certification. *Id.*

On appeal, the Second Circuit reversed the district court's decision and remanded, in part, with instructions

to certify a class with respect to liability and to also consider certifying a damages class. *Id.* at 230–31.

B. Second Circuit's Analysis

The Second Circuit viewed prior circuit case law regarding the scope of FRCP 23(c)(4)(A) as presenting a circuit split. *See In re Nassau,* 461 F.3d at 226 (this is "a matter as to which the Circuits have split"). In reaching that conclusion, the court, referring to *Castano*, stated that "[t]he Fifth Circuit has adopted a 'strict application' of Rule 23(b)(3)'s predominance requirement." *Id.* (citation omitted). Citing *Castano*'s dicta, the Second Circuit stated: "[u]nder this view, '[t]he proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a *cause of action*, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial.'" *Id.* (*quoting Castano,* 84 F.3d at 745 n.21)(second alteration in original)(emphasis added). In contrast, the Second Circuit recognized that "[t]he Ninth Circuit holds a different view. Pursuant to that court's precedent, '[e]ven if the common questions do not predominate over the individual questions so that class certification of the entire action 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.'" *Id.* (*quoting Valentino*, 97 F.3d at 1234)(second alteration in original).[5] The Second Circuit agreed. *Id*.

In reaching its decision, the Second Circuit looked to the plain language of Rule 23. "When appropriate [] an action may be brought or maintained as a class action *with respect to particular issues*. . . ." *Id.* at 226 (*quoting* FED. R. CIV. P. 23(c)(4)). The court then cited the Advisory Committee notes which stated, "the action may retain its 'class' character *only* through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims." *Id.* (*citing* FED. R. CIV. P. 23(c)(4) Advisory Committee's notes to 1966 amend.). The Second Circuit further explained that "a court may employ Rule 23(c)(4) when it is the 'only' way that a litigation retains its class character, i.e., when common questions predominate only as to the 'particular issues' of which the provision speaks." *Id.* Lastly, the Second Circuit relied on commentators, who have supported the notion that subsection (c)(4) may be employed for class treatment of single issues when the whole action does not satisfy Rule 23(b)(3). *Id.* (*citing* 7AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1790 (3d ed. 2005); 6 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 18:7 (4th ed. 2002)).

The Second Circuit refused to follow what it characterized as the Fifth Circuit's view—that the predominance requirement must be met with respect to the *entire action* before FRCP 23(c)(4)(A) can be used. Rejecting that rationale as well as the notion that FRCP 23(c)(4)(A) is merely a "housekeeping rule," the court found it would "render[] subsection (c)(4) virtually null, which contravenes the 'well-settled' principle 'that courts should avoid statutory interpretations that render provisions superfluous.'" *Id.* at 226–27 (citation omitted). According to the Second Circuit's understanding of the Fifth Circuit's view, "a court considering the manageability of a class action—a requirement for predominance under Rule 23(b)(3)(D)—[would have] to pretend that subsection (c)(4)—a provision specifically included to make a class action more manageable—does not exist until after the manageability determination [has been] made." *Id.* at 227. (*quoting Gunnells*, 348 F.3d at 439)(alterations in original). Therefore, "a court could only use subsection (c)(4) to manage cases that the court had already determined would be manageable *without* consideration of subsection (c)(4)." *Id.* (*quoting Gunnells*, 348 F.3d at 439).

IV. Circuit Court Split?

Technically, there appears to be a split of authority as to the scope of FRCP 23(c)(4)(A) certification between the Fifth Circuit on one side (restrictive application to a cause of action as a whole), and the Ninth and Second Circuits on the other side (broader application to particular issues). However, the "split" may be form over substance.

Indeed, courts, which have grappled with this issue for many years, are in agreement that a class may be certified pursuant to FRCP 23(c)(4)(A) as long as certification will advance resolution of the litigation. *See, e.g., Gunnells*, 348 F.3d 417, 428–29 (class treatment of a single claim against defendant health plan administrators would advance the litigation because the common issues do not require any individualized inquiry); *Valentino*, 97 F.3d 1227, 1229 (vacating the district court's decision and remanding the action because, *inter alia*, the district court failed to address whether certification of the issues would advance resolution of the litigation); *Pryor*, 2004 WL 1207642 at *6 (Applying the *Tetracycline* predominance test, court denied class certification because it would "do substantially nothing" to advance the litigation); *Rink*, 203 F.R.D. 648, 670 (finding that class-wide determination of the common issues would not measurably advance the litigation); *Emig*, 184 F.R.D. 379, 395 (holding that certification of particular issues would not advance the litigation which is the relevant inquiry under 23(c)(4)(A)). Even *Castano*, 84 F.3d 734, 739 recognized this concept (reversing the district court's decision to certify a class under FRCP 23(c)(4)(A) because *inter alia*, the lower court failed to analyze how core liability issues would advance the cases.)

While *In re Nassau* may be a "benchmark" decision, it too recognized the advancement of the litigation concept. *See In re Nassau*, 461 F.3d at 225, 230. ("[T]his action already has progressed substantially and, again, offers the

benefit of a liability phase that can be resolved quickly and conclusively") *Id.* at 230. Perhaps resolution of this issue will come from the Supreme Court; or perhaps, courts will abstain from deciding with which side of the "circuit split" they agree, focusing instead on whether certification will advance the litigation.

V. The Prognosis

In both the securities and antitrust arenas, it seems unlikely that the Second Circuit's decision will have much of an impact. The issues in antitrust cases—relevant market, anticompetitive behavior, price-fixing, etc.—are so intertwined that it would be difficult to accomplish any efficiencies of class litigation by certifying only one of the issues. For example, even if one could establish the overall issue of anticompetitive conduct on a class-wide basis, each plaintiff would still have to demonstrate the existing relevant market in order for such conduct to become actionable. Thus, certification of the anticompetitive conduct issue would not advance the litigation. The same would appear true for securities class action litigation in those instances where reliance may not be presumed. It seems doubtful that a court would certify all but the reliance issue (necessary for a securities fraud claim) and countenance the inefficiencies of separate trials on that issue.

Endnotes

1. There, the only "element" that was certified pursuant to FRCP 23(c)(4)(A) was the dispositive element of materiality in a Securities Act of 1933 § 12(2) claim. Such claim is essentially strict liability; thus, the litigation is advanced once the materiality of a misrepresentation has been established.
2. On remand, the district court certified the class pursuant to FRCP 23(b)(3). *Flanagan v, Allstate Ins. Co.*, No. 01 C 1541, 2006 WL 1444919, slip copy, (N.D. Ill. Jan. 11, 2006).
3. This footnote is sometimes misunderstood as supporting the proposition that an *action* as a whole must satisfy the predominance requirement before certification can be granted. *See In re Factor VIII,* 2005 WL 497782, at *2 (defendants rely on the *Castano* footnote for the proposition that prior to certifying issues under FRCP 23(c)(4)(A), a class must meet the predominance requirement; the court concedes that "the footnote has gained a following"); *Rink v. Cheminova, Inc.*, 203 F.R.D. 648, 671 n.20 (M.D. Fla. 2001)("if the view expressed in *Castano* is correct, then there can be no certification of an issues class . . . because Plaintiffs cannot satisfy the predominance requirement of Rule 23(b)"). However, a simple reading of *Castano* makes clear that the footnote refers to a *cause of action*—not the entire action. *See Gunnells*, discussed *infra.*
4. *Gunnells* is also instructive in its attempt to clarify the confusion between the terms "action," "cause of action," and "claim" within the context of the application of FRCP 23(c)(4)(A). *See Gunnells,* 348 F.3d at 441–44. *Gunnells* instructs that the *Castano* footnote's reference to a "cause of action" does not mean an entire lawsuit as the *Gunnells* dissent suggests, but rather denotes a claim within a lawsuit. *Id.* at 444. Further, *Gunnells* points out that "*no* court has adopted the dissent's interpretation of Rule 23; no court has required a *lawsuit*-specific predominance analysis." *Id.* at 443.
5. Additionally, the Second Circuit noted that the Fourth Circuit, in *Gunnells*, allowed certification as to one cause of action under FRCP 23(c)(4)(A). *In re Nassau*, 461 F.3d at 226 (*citing Gunnells*, 348 F.3d at 439).

This report was prepared by Susan Salvetti of the Class Action Committee of the Commercial and Federal Litigation Section of the New York State Bar Association. The Class Action Committee of the Commercial and Federal Litigation Section is chaired by Ira A. Schochet.