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Reexamining the Seventh Amendment Argument Against Issue Certification

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I. Introduction

Issue certification is a controversial means of handling aggregate claims in Federal Courts. Federal Rule of Civil Procedure ("FRCP") 23(c)(4) provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues."[1] Issue certification has returned to the radar screen of academics,[2] class action counsel,[3] and defendants.[4] The Supreme Court's decision regarding the need for viable damage distribution models in *Comcast v. Behrend*[5] may spur class counsel in complex cases to bifurcate liability and damages.

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1. FED. R. CIV. P. 23(c)(4).

2. Recent publications supporting revitalizing issue certification include Jenna C. Smith, *"Carving at the Joints": Using Issue Classes to Reframe Consumer Class Actions*, 88 WASH. L. REV. 1187 (2013); John C. Coffee, Jr., *The New Class Action Landscape: A Trail Map to Class Certification and Practice in the Era After Wal-Mart and Concepcion*, *in* THE 15TH ANNUAL NATIONAL INSTITUTE ON CLASS ACTIONS (Am. Bar Ass'n 2011).

3. Mark A. Perry, *Issue Certification Under Rule 23(c)(4): A Reappraisal*, 62 DEPAUL L. REV. 733, 744 (2013).

4. JOHN BEISNER, JESSICA MILLER & JORDAN SCHWARTZ, U.S. CHAMBER OF COMMERCE, INST. FOR LEGAL REFORM, A ROADMAP FOR REFORM: LESSONS FROM EIGHT YEARS OF THE CLASS ACTION FAIRNESS ACT 15 (2013).

5. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1436-37 (2013) (Ginsburg, J., dissenting) (citing FED. R. CIV. P. 23(c)(4) as a possible response to heightened certification requirements).

The successes of tobacco-injury plaintiffs in Florida's *Engle v. Liggett Group* cases show that personal injury actions can make use of issue class actions.[6]

Class defendants often assert three common arguments against issue certification. First, certifying a class as to certain issues would make class certifications too easy, circumventing the requirements for predominance and superiority under FRCP Rule 23(b)(3).[7] This argument has been extensively analyzed and criticized by several courts as disregarding the text of Rule 23 and the Advisory Committee's commentary.[8] Another common argument against issue certification is that class treatment and trial on the common issues will not advance a case, and is not worth the trouble.[9] However, making all individuals relitigate the common issues repeatedly is even more inefficient.[10] A third argument posited against issue certification—and the one addressed in depth here—relates to the Seventh Amendment and the re-examination clause.

Until 1995, the Seventh Amendment and class certification coexisted with little discussion. Then, a federal appellate court decertified a class of HIV-infected hemophiliacs who sought a class action trial of the common issues of their claims against blood factor manufacturers.[11] Judge Richard Posner, writing for the Seventh Circuit Court of Appeals, supported the ruling on several grounds, including that

6. Engle v. Liggett Grp., Inc., 945 So. 2d 1246, 1269-77 (Fla. 2006) (permitting class decision on tort liability, general causation and conspiracy to stand, but requiring individual smokers to prove specific causation and damages).

7. *See* Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996); Perry, *supra* note 3, at 744.

8. *See, e.g., In re* Nassau County Strip Search Cases, 461 F.3d 219, 227 (2d Cir. 2006) (holding that a court may certify a class as to a particular issue despite the fact that plaintiffs' claims taken together do not satisfy Rule 23's predominance requirement); Klay v. Humana, Inc., 382 F.3d 1241, 1274 (11th Cir. 2004); Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 439 (4th Cir. 2003) ("The dissent would require a court considering the manageability of a class action—a requirement for predominance under Rule 23(b)(3)(D)—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 is made. . . . This reading leaves subsection (c)(4)(A) without any practical application, thereby rendering it superfluous.").

9. Jones v. Allercare, Inc., 203 F.R.D. 290, 292 (N.D. Ohio 2001) (noting even a successful finding on "general causation" would not "necessarily advance the interests of the members of the class.").

10. 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, 250 (2002).

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

the proposed bifurcated proceedings could run afoul of the Seventh Amendment's imperative that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[12] The court posited that a class jury ruling on the matter of negligence of the blood factor manufacturers in the case might be reexamined when, in the proposed individual trials, subsequent juries considered the plaintiff's conduct on the issue of comparative negligence.[13] This decision, *In re Rhone Poulenc*, became the dominant precedent cited by courts that subsequently denied attempts to partially certify class actions under FRCP 23(c)(4).[14] As a result, issue certification, both as a tool for federal courts to manage complex litigation and as a means for plaintiffs seeking streamlining of their suits against deep-pocketed defendants, fell mostly into desuetude.

The Seventh Circuit got the Seventh Amendment wrong. Critics and jurists exploring the historical basis for the Seventh Amendment have demonstrated that the Seventh Amendment was included in the Bill of Rights to prevent the federal courts from re-litigating entire claims already decided by a state court.[15] The drafters of the Seventh Amendment were not focusing on the potential for federal juries to review overlapping evidence and reading conflicting results.[16] However, the reexamination argument set out in *Rhone Poulenc* suffers from even more basic weaknesses; chiefly that the defendant raising the Seventh Amendment argument pre-certification has suffered no Seventh Amendment privation at that time, and likely would only see their loss reexamined to their benefit if a careless judge or rogue jury did revisit common issues decided by the class jury. The Seventh Amendment argument is sorely speculative and cannot justify denying issue

12. The full text of the Seventh Amendment states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

13. *In re* Rhone-Poulenc Rorer Inc., 51 F.3d at 1303.

14. *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996); *infra* note 36.

15. *See, e.g.*, *In re* Simon II Litig., 211 F.R.D 86, 155 (E.D.N.Y. 2002); Romberg, *supra* note 10, at 250; Patrick Woolley, *Mass Tort Litigation And The Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499 (1998).

16. *See supra* note 15.

certification.

Issue certification does not run afoul of the Seventh Amendment because of the constitutional doctrines of standing and ripeness. Part II(A) and II(B) examines FRCP 23 and the history of class actions and issue certifications. Next, Part II(C) analyzes *Rhone Poulenc* and its Seventh Amendment analysis. Part III(A) argues that ripeness and standing undermine Seventh Amendment arguments concerning reexamination. First, as to ripeness, the reexamination argument relies on a series of speculations: that the class plaintiffs will prevail on the trial of the common issues; and that a second jury would—contrary to legal presumptions[17] — ignore the trial judge's instructions, and then reexamine some part of the class decision. These multiple suppositions should not preclude issue classes. Second, even if the matter becomes ripe, the defendant will still lack standing: it is only when the issue-class plaintiff prevails on the first round that a second jury could exist. If the second jury spurns the trial court's instructions by revisiting issues decided in the first trial, that reexamination would likely redound to the defendant's benefit, diminishing in some manner the common issue finding favoring the class plaintiffs. Thus, the defendants would lack standing to advance a Seventh Amendment claim because the defendants would suffer no harm. Finally, Part III(B) notes that the class plaintiffs—the likely potential victims of any jury reexamination—can avoid a Seventh Amendment complaint by voluntarily and knowingly waiving violations, just as American citizens can for any of their constitutional rights.

II. Rule 23 And Issue Certification

A. *The Emergence of Class Actions*

Justice Story—while serving as a circuit judge—developed the elements of today's modern class action..[18] The Supreme Court adopted

17. *See, e.g.*, Richardson v. Marsh, 481 U.S. 200, 206 (1987) (noting "the almost invariable assumption of the law that jurors follow their instructions . . . ."); Tennessee v. Street, 471 U.S. 409, 415 (1985) (noting the "crucial assumption that the jurors followed the instructions given them by the trial judge") (quoting Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983) (citations omitted)) (internal quotation marks omitted); Woolley, *supra* note 15, at 526 (explaining that courts generally presume that juries will follow their instructions).

18. *See* West v. Randall, 29 F. Cas. 718, 721-23 (C.C.D. R.I. 1820) (No. 17424); *see also* JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS § 9 (3d ed. 1844)

his standards,[19] and then Congress codified them in the precursor to the FRCP: the Federal Equity Rules.[20] One of these precursors to FRCP 23, Federal Equity Rule 38 of 1912, stated merely: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the

(discussing the categories of class actions); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 376-77 (1967). The modern-day "class action" had probably existed in some form long before Justice Story formulated his rules. As noted by Judge Heartfield:

> Although it appears that the modern-day class action was born probably some time during the Middle Ages, there are reports of ecclesiastical proceedings against numerous insects and animals dating as early as A.D. 824. . . . Inhabitants of an area afflicted with locusts, rats, weevils, or other depredators would petition the Church for relief. The offending insects or rodents would be summoned to court, and, upon their inevitable nonappearance, tried in abstentia [sic], and ordered to cease and desist from their wrongful behavior and to depart the area, or to suffer excommunication and church anathemas.

Shaw v. Toshiba Am. Info. Sys., Inc., 91 F. Supp. 2d 942, 946-47 (E.D. Tex. 2000) (citations omitted).

19. Smith v. Swormstedt, 57 U.S. (16 How.) 288, 303 (1853). In handling a dispute between the north and south factions of the United Methodist Church divided by slavery, the court adopted Justice Story's formulation as to suits in representative capacity:

> The rule is well established that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest. . . . Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained.

Id. at 298-303.

20. Romberg, *supra* note 10, at 257.

court, one or more may sue or defend for the whole."[21] Based upon this language in Federal Equity Rule 38 of 1912, and long before Rule 23's creation, courts engaged in what would now be called the kind of "issue certification" that later courts found to be possible under Rule 23(c)(4).[22]

The purpose of Rule 23, therefore, was to articulate formal rules for the consolidation of similar cases, as opposed to the earlier custom of leaving this process up to the wide discretion of trial judges.[23] Rule 23 imposed specific requirements such as numerosity, commonality, providing adequate notice, etc., to any group seeking "class action" certification.[24] These requirements empowered judges to consolidate claims in response to increasing strains upon judicial resources.[25]

B. *The Emergence of Issue Certifications under 23(c)(4)*

In the 1966 amendments, Rule 23(c)(4) was revised to read, "When appropriate, an action may be brought or maintained as a class action with respect to particular issues."[26] The Advisory Committee provided as an example "a fraud or similar case [where] the action may retain its

21. *Id*. (quoting Fed. Equity R. 38, 226 U.S. 659 (1912) (repealed 1938)).

22. *See, e.g.*, Carnahan v. Peabody, 31 F.2d 311, 312 (S.D.N.Y. 1929) (holding that a representative suit may be brought on behalf of a large number of a deceased's heirs, in order to determine the issue of whether a trust created by the deceased's brothers was invalid); s*ee also* Zechariah Chafee, Jr., *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1300-01 (1932) ("Nothing in the nature of things prevents a law judge from doing much more to bring about a convenient unification of parallel suits pending in his court between different parties, and codes or practice acts often give him this power. Thus a federal statute provides: 'When causes of a like nature or relative to the same question are pending before a court of the United States . . . the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so.'") (quoting 28 U.S.C. § 734 (1926), derived from 3 Stat. 21 (1813)).

23. Kaplan, *supra* note 18, at 376.

24. *Id.*; *see also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997).

25. When FRCP Rule 23 was created in 1938, the principles of claim and issue consolidation that existed in simple language within the Federal Equity Rules were transformed into a series of rules that distinguished cases into categories, which were often vague. Rule 23's amendment in 1966 attempted to discard this vague language and make the process more practical. *See* Kaplan, *supra* note 18, at 376-80.. As the drafters amended the rules to make them more practical they also attempted to make them more inclusive, rejecting early suggestions which would not have included some of the current grounds for class action certification (specifically those under Rule 23(b)(3)). *Id.* at 394 ("This timid course was unthinkable in the face of the insistent need to improve the methods of handling litigation affecting groups.").

26. FED. R. CIV. P. 23(c)(4).

'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."[27] Thus, Rule 23(c)(4) permits courts to resolve some parts of complex claims piecemeal when all components of the claim are not eligible for class certification.[28]

After the 1966 amendments, many courts certified "issue classes" by treating the common issues of plaintiffs' claims as a single triable matter, severing individual examinations for subsequent trials.[29] These courts did not mention a potential Seventh Amendment conflict with issue certification.[30] However, the long tradition of class and issue certifications that existed before and after the creation of Rule 23 was severely chilled in the mid-1990's.

27. FED. R. CIV. P. 23(c)(4) advisory committee's note.

28. Simon v. Phillip Morris Inc., 200 F.R.D. 21, 29-30 (E.D.N.Y. 2001) ("The framers of Rule 23(c)(4)(A) considered class actions brought under Rule 23(b)(3)--characteristically disputes that involve numerous individual proofs of causation and injury--particularly well suited for certification of fewer than all issues. Their conclusion follows from the fact that Rule 23(c)(4)(A) assists in satisfying Rule 23(b)(3)'s additional class certification requirements of predominance and superiority.") (citations omitted).

29. *See, e.g.*, Cent. Wesleyan Coll. v. W.R. Grace & Co., 6 F.3d 177, 185 (4th Cir. 1993) (affirming certification in asbestos action of eight issues regarding defendants' conduct because "[s]ignificant economies may be achieved by relieving [plaintiffs] of the need to prove over and over when defendants knew or should have known of asbestos' hazards, or whether defendants engaged in concerted efforts to conceal this knowledge, or even whether certain of defendants' products crumble and release dust . . . ."); Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1196-97 (6th Cir. 1988) (in land contamination case, stating that "[i]n mass tort accidents, the factual and legal issues of a defendant's liability do not differ dramatically from one plaintiff to the next" and using Rule 23(c)(4)(A) to certify issues of "the level and duration of chemical contamination, the causal connection, if any, between the plaintiffs' consumption of the contaminated water and the type of injuries allegedly suffered, and the defendant's liability" while leaving individual proofs of amount of damages for later proceedings); *In re* Sch. Asbestos Litig., 789 F.2d 996, 1008-09 (3d Cir. 1986) (approving certification of liability issues in asbestos litigation because "[e]ven if the action thereafter 'degenerates' into a series of individual damage suits, the result nevertheless works an improvement over the situation in which the same separate suits require an adjudication on liability using the same evidence over and over again."); Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 471 (5th Cir. 1986) (affirming certification in asbestos personal injury action of "defense-related questions" such as product identification, product defectiveness, gross negligence, and "state of the art" defense); *see generally In re* Agent Orange Prod. Liab. Litig. MDL No. 381, 818 F.2d 145 (2d Cir. 1987) (affirming certification of asbestos personal injury settlement class based on centrality of question of military contractor defense).

30. *See, e.g.*, *Jenkins*, 782 F.2d at 474 (asserting with little comment that "Defendants' constitutional challenges to bifurcation are . . . unavailing").

C. Rhone Poulenc *and the Rejection of Issue Certification.*

In 1995, the Seventh Circuit heard a mandamus appeal regarding a class certification order issued by Judge Grady, who presided over a multidistrict litigation of contaminated blood factor lawsuits.[31] Plaintiffs were hemophiliacs infected by AIDS who sued the blood factor manufacturers under their respective state laws.[32] Plaintiffs alleged that over two thousand hemophiliacs died of AIDS, with as many as twenty thousand possibly HIV-positive.[33] Plaintiffs sought a national class action on the issue of defendants' liability, alleging that if the manufacturers had been more vigilant with respect to screening donors for hepatitis B, they would have decreased the likelihood of HIV contaminating their products.[34] Plaintiffs also alleged that the manufacturers were slow to take on other measures that could have prevented contamination.[35] The trial court found too many differences between the class members for certification under FRCP Rule 23(b)(3).[36] However, the court ruled that a class could litigate the common question of negligence, and then (if the defendants were found liable for negligence), individual class members could try their remaining issues, such as causation and damages.[37] After the court issued an order under Rule 23(c)(4), the defendants appealed via a writ of mandamus.[38]

The Seventh Circuit granted the mandamus petition and ruled that the issue certification "exceeded the bounds of allowable judicial discretion."[39] Judge Posner, writing for the majority, rested the decision

31. *See In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1303 (7th Cir. 1995).

32. *Id.* at 1394.

33. *Id.* at 1296.

34. *Id.*

35. *Id.* at 1296-97.

36. Wadleigh v. Rhone-Poulenc Rorer, Inc., 157 F.R.D. 410, 422 (N.D. Ill. 1994). FRCP Rule 23(b)(3) allows for class treatment of a claim where the plaintiff can show the perquisites of Rule 23(a) (numerosity, typicality, commonality, and adequacy of class representative and counsel) as well as "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3).

37. *Wadleigh*, 157 F.R.D. at 422-23.

38. Rule 23 was amended in 1998 to provide greater discretion to appellate courts to review class certification rulings. *See* FED. R. CIV. P. 23(f).

39. *See Rhone-Poulenc*, 51 F.3d at 1303. The court came to this conclusion for three reasons: First, the court asserted a policy argument, a "concern with forcing these defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability, when it is

on the reexamination clause of the Seventh Amendment to the Constitution.[40] Judge Posner reasoned that a class trial on negligence would inexorably lead to subsequent juries reexamining the same issues:

> A second or subsequent jury might find that the defendants' failure to take precautions against infection with Hepatitis B could not be thought the *proximate* cause of the plaintiffs' infection with HIV, a different and unknown blood-borne virus. How the resulting inconsistency between juries could be prevented escapes us.[41]

The *Rhone Poulenc* court's Seventh Amendment analysis relied primarily upon the Supreme Court's decision in *Gasoline Products Co. v. Champlin Refining Co.*[42] However, the *Gasoline Produce* decision says little about the Re-Examination Clause of the Seventh Amendment, its purpose, and its application.

In *Gasoline Products*, the plaintiff sued for royalties under a licensing contract regarding a patented process of manufacture.[43] The defendant (Champlin) counterclaimed for damages, alleging that the plaintiff failed to perform a related contract to construct part of a plant.[44] The district court refused to allow the jury to consider Champlin's counterclaim, and Gasoline Products won its royalty claim.[45] The First Circuit reversed, finding Champlin had presented sufficient evidence for its counterclaim.[46] At the retrial, the parties stipuled to Gasoline

entirely feasible to allow a final, authoritative determination of their liability for the colossal misfortune that has befallen the hemophiliac population to emerge from a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions." *Id.* at 1299. The second articulated concern was more pragmatic: that the district judge, "propose[d] to have a jury determine the negligence of the defendants under a legal standard that does not actually exist in the world," but is rather based on "the concept of 'general' common law." *Id.* at 1300. The third reason was that bifurcation in this case would lead to subsequent juries reexamining the first jury's findings, in violation of the Seventh Amendment. *Id.* at 1302.

40. *Id*. at 1303.

41. *Id*.

42. *Id.* at 1303 (citing Gasoline Prods. Co., v. Champlin Refining Co, 283 U.S. 494 (1931)).

43. *Gasoline Prods.*, 283 U.S. at 495.

44. *Id.*

45. Champlin Refining Co. v. Gasoline Prods. Co., 29 F.2d 331 (1st Cir. 1928).

46. *Id.*at 338-39.

Product's royalty damages .[47] Champlin received a favorable verdict on it counterclaim, but for a sum about $20,000 less than owed to Gasoline Products.[48] The First Circuit again reversed, agreeing with Champlin that the trial judge improperly instructed the jury on calculating damages.[49] The court vacated the verdict "only as to damages" and the case was "remanded to that court for a new trial on the question of defendant's damages."[50] The court's opinion did not reference the Seventh Amendment.

On appeal, Gasoline Products claimed that by limiting the new trial only to damages—and preventing it from arguing an absence of liability under Champlin's alleged contracts—the ruling violated its Seventh Amendment rights to have a single jury hear the entire claim.[51] The Supreme Court reviewed prior decisions on re-trials and partial verdicts, and cited to the Seventh Amendment in passing.[52] The Court rejected Gasoline Product's broad argument that any error found in a part of one verdict necessitated a full retrial.[53] In a holding with seemingly little relevance to issue certification, the Court held "where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again."[54] However, the Court found that the issue of damages, including profit loss and mitigated damages, could not be separated from liability under the counterclaim due to the confusing record and conflicting testimony.[55] Because the re-trial jury could not be instructed to assume material facts essential to assess damages, a retrial on all aspects of the counterclaim was ordered.[56] Importantly, the Court relied on the Due Process Clause for its full re-trial decision, and not the Seventh Amendment, finding that "the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which

47. Gasoline Prods.Co. v. Champlin Refining Co., 39 F.2d 521, 521 (1930).
48. *Id.*
49. *Id.* at 524.
50. *Id.*
51. Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494, 497 (1931).
52. *Id.*
53. *Id.* at 500.
54. *Id.*at 499.
55. *Id.*at 500.
56. *Id.*

would amount to a denial of a fair trial."[57]

The *Gasoline Products* decision reveals little about the applicability of the re-examination clause. In fact, it seems that on a cleaner record on contract formation and loss mitigation, the Court may have upheld the First Circuit's decision limiting the re-trial to damages. Nevertheless, subsequent courts and commentators generally accepted the *Rhone-Poulenc* analysis of the Seventh Amendment and *Gasoline Products*, and applied it to later cases.[58] The Fifth Circuit ran furthest with the *Rhone*

57. *Gasoline Prod. Co.*, 283 U.S. at 500-01.

58. *See, e.g.*, Blyden v. Mancusi, 186 F.3d 252, 268-69 (2d Cir. 1999) (holding that the lower court impermissibly bifurcated the liability and damages issues in the action in violation of the Seventh Amendment); Cimino v. Raymark Ind., Inc., 151 F.3d 297, 320-21 (5th Cir. 1998) (holding that defendant's Seventh Amendment rights were violated when a jury was not permitted to determine the amount of damages owed to each plaintiff); Castano v. Am. Tobacco Co., 84 F.3d 734, 750 (5th Cir. 1996) (rejecting certification of tobacco companies' conspiracy to hide addictiveness of cigarettes and whether nicotine was addictive, citing to state law differences and the Seventh Amendment); *In re* Welding Fume Prods. Liab. Litig., 245 F.R.D. 279, 317 (N.D. Ohio 2007) (holding bifurcation not appropriate in products liability case because "[t]he undersigned is not entirely confident that, were it to certify *sua sponte* a smaller class or more limited issues, it would avoid" the reexamination problems encountered in *Rhone-Poulenc*); Fisher v. Ciba Specialty Chem. Corp., 238 F.R.D. 273, 315-16 (S.D. Ala. 2006) (rejecting issue certification, noting that the second jury would have to reconsider defendant's conduct when considering causation and damages); Benner v. Becton Dickinson & Co., 214 F.R.D. 157, 174 (S.D.N.Y. 2003) (denying issue certification because issues of negligence and comparative negligence were too interrelated and thereby certification would lead to violation of the Seventh Amendment); *In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 209 F.R.D. 323, 352 (S.D.N.Y. 2002) (denying issue certification because dividing litigation between general and specific liability would violate the Seventh Amendment's reexamination clause); Rink v. Cheminova, Inc., 203 F.R.D. 648, 652 (M.D. Fla. 2001) ("[E]ven if this Court were to accept the Plaintiffs' invitation to certify a class action limited only to the so-called common issue of whether the Defendants delivered a defective product, and even if a jury answered this question in the Plaintiffs' favor, any subsequent mini-trial involving the issue of whether the delivery of the defective product caused injury and damage to a particular Plaintiff would necessarily have to involve all of the facts and circumstances surrounding the delivery of the product if the Defendants are to receive the benefit of Florida's law governing the apportionment of fault."); O'Connor v. Boeing N. Am., Inc., 197 F.R.D. 404, 415 (C.D. Cal. 2000) ("[A] class trial on liability without any reference to the limitations defense runs 'the real risk . . . of a composite case being much stronger than any plaintiff's individual action would be . . . .'"); Cohn v. Mass. Mut. Life Ins. Co.,189 F.R.D. 209, 219 (D. Conn. 1999) (denying certification because of the potential for relitigating interrelated issues that would violate the Seventh Amendment); Emig v. Am. Tobacco Co., Inc., 184 F.R.D. 379, 393 n.14, 395 (D. Kan. 1998) (The Court "recognizes that there is some disagreement on whether trying a single plaintiff's claims to multiple juries violates defendants' Seventh Amendment rights. However, reaching that issue is not necessary because the court finds that there are sufficient reasons, other than any Seventh Amendment concern, to deny certification." The court denied FRCP 23(c)(4) certification where "the general causation questions of whether cigarettes cause

Poulenc decision. In *Castano v. American Tobacco Co.*, the court certified a nationwide class of nicotine-addicted smokers.[59] It noted the "core liability issues" as whether the tobacco companies knew about nicotine addiction and had deliberately suppressed other common components of causes of action for fraud, elements of the consumer protection claims, and the breach of warranty.[60] The Fifth Circuit reversed, concluding issue certification "would write the predominance requirement [of FRCP 23(b)(3)] out of the rule, and any common issue would predominate if it were common to all the individual trials."[61] *Castano* also cited to the Seventh Amendment and *Rhone Poulenc* to decertify the class.[62]

In this line of case law, only courts within the Second Circuit sounded a different note. In a prelude to a decision where he contemplated the application of issue certification of to civil RICO claims against cigarette companies, longtime District Court Judge Jack Weinstein wrote a lengthy opinion that followed the historical antecedents of the Seventh Amendment and criticized *Rhone Poulenc* and its progeny:

> [T]he Framers' main objective in drafting the Seventh Amendment was to limit the ability of an appellate court, specifically the Supreme Court, to review de novo and overturn a civil jury's findings of fact. Nowhere is there an indication that the Framers intended to constrain the trial judge's substantial discretion to employ appropriate mechanisms of jury control.[63]

the harms alleged by plaintiffs are invariably bound up in their claims that cigarettes caused their injuries[,]" which presents individualized questions.); *In re* Masonite Corp. Hardboard Siding Prods. Liab. Litig., 170 F.R.D. 417, 425-26 (E.D. La. 1997) (stating that "bifurcation of manufacturer conduct and comparative negligence can violate Seventh Amendment considerations by having the second jury reconsider the decided factual question of manufacturer negligence."); Smith v. Brown & Williamson Tobacco Corp., 174 F.R.D. 90, 96 (W.D. Mo. 1997) (bifurcating general and specific causation may violate the Seventh Amendment because of the "genuine risk that the general issue would be 'redecided' by the subsequent jury.").

59. *Castano*, 84 F.3d 734, 739-40.

60. *Id.*

61. *Id.* at 744-45.

62. *Id.* at 751 (stating that in a comparative negligence case, "[t]here is a risk that in apportioning fault, the second jury could reevaluate the defendant's fault, determine that the defendant was not at fault, and apportion 100% of the fault to the plaintiff," which violates the Seventh Amendment's reexamination clause).

63. Simon v. Philip Morris Inc., 200 F.R.D. 21, 33 (E.D.N.Y. 2001); *see also*

The Second Circuit cited to Judge Weinstein in rejecting the *Castano* decision, and encouraged the use of FRCP 23(c)(4), with little concern over the Seventh Amendment argument.[64] Several other opinions have followed suit, including courts in the Fourth and Eleventh Circuits.[65]

Meanwhile, Judge Posner seemed to change his views on class actions. In a 2003 decision, *Mejdrech v. Met-Coil Systems Corp*, the defendant appealed via FRCP 23(f), from the grant of class certification in a groundwater pollution case.[66] The district court certified the "core questions" of "whether or not and to what extent [Met-Coil] caused contamination of the area in question."[67] Writing for the court, Judge Posner wrote that judicial economy favored treating the general liability

Woolley, *supra* note 15 at 509 (quoting Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 679 (1973)) ("Anti-Federalists feared the federal courts would oppress local debtors on behalf of out-of-state creditors. The fact that retrials on appeal in the Supreme Court might be by jury provided little comfort. As Professor Wolfram has explained, 'the last resort for the hounded debtor was a hopefully sympathetic jury in his local federal court.' In addition, Anti-Federalists were concerned about the cost of retrying cases in the capital. For these reasons, the Anti-Federalists sought not only to preserve the right to jury trial, but to ensure that no retrials whatsoever would take place in the Supreme Court.").

64. Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 167 (2d Cir. 2001) (holding that bifurcation does not violate the Seventh Amendment, as long as particular factual issues are not re-tried by a subsequent jury). The Second Circuit has similarly supported issue certification in many opinions – so long as the issues do not completely overlap, the jury has been properly instructed, and where certifying issues would actually provide efficiency. *See, e.g.*, Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91 (2d Cir. 2007) (instructing the district court on remand from reversal of denial of certification to consider whether certification on the issue of antitrust injury was warranted) (citations omitted); *In re* Nassau Cnty. Strip Search Cases, 461 F.3d 219, 227 (2d Cir. 2006) (rejecting *Castano* and holding that a court may certify a class as to a particular issue despite the fact that plaintiffs' claims taken together do not satisfy FRCP 23's predominance requirement). *Contra* McLaughlin v. Am. Tobacco Co. 522 F.3d 215 (2d Cir. 2008) (concluding that issue certification was not available in Racketeer Influenced and Corrupt Organizations Act case, alleging decades-long fraud on the safety of lower-tar cigarettes because issues of reliance, injury, and damages were so great that issue classes would not promote judicial economy). *See* Blyden v. Mancusi, 186 F.3d 252, 268-69 (2d Cir. 1999) (finding the district court lacked a trial plan to ensure issues would not overlap and be re-examined).

65. Klay v. Humana, Inc., 382 F.3d 1241, 1274 (11th Cir. 2004) (rejecting *Castano*, holding that district court correctly found that common issues predominate, despite the need to determine damages on an individualized basis); Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 439 (4th Cir. 2003).

66. Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910 (7th Cir. 2003).

67. *Id.* at 911.

issues in "one fell swoop," leaving individual issues to be decided after.[68] Posner referenced *Rhone Poulenc*, but not the Seventh Amendment discussion. Rather than fret over a "reexamination," Posner suggested as some solace to the defendants that if the class jury was wrong about the extent of defendant's misconduct, the individual juries would serve as a backstop to prevent a miscarriage of justice.[69]

While these more recent decisions have sidestepped (or sideswiped) the Seventh Amendment holding in *Rhone Poulenc*, what has been ignored is the more basic question of whether or not defendants' Constitutional rights are actually violated when the issue certification is granted. Whose rights are at issue when a potential second jury "reexamines" the decision of the first "issues class" jury? Can the class members—concluding that some class treatment is better than none—waive their reexamination rights under the Seventh Amendment, thereby removing the potential Seventh Amendment violation as a basis to deny issue certification?

68. *Id.*

69. *Id.* at 912 ("First, the two questions that the judge has set for class treatment – whether there was unlawful contamination and what the geographical scope of the contamination was – are not especially complex. Second, even if these questions are answered against Met-Coil, the consequences for it will not be catastrophic. The individual class members will still have to prove the fact and extent of their individual injuries. The need for such proof will act as a backstop to the class-wide determinations."); *see also* Carnegie v. Household Int'l, Inc., 376 F.3d 656 (7th Cir. 2004) (relying on FRCP 23(c)(4) to certify a RICO claim as to fraud, without reference to the Seventh Amendment).

Very recently, the Fifth Circuit seemed to ignore *Castano's* imperative that a class must meet certification under FRCP 23(b)(3) before consideration of issue certification. In approving a settlement of the economic damages for business hurt by the Deepwater Horizon oil spill in the Gulf, the court blithely noted that the district court could have simply considered liability issues separately, undercutting BP's argument that Article III required determining that each class members suffered an injury. *In re* Deepwater Horizon, 739 F.3d 790 (5th Cir. 2014) (noting that "the district court anticipated that 'issues relating to damages' could and would be 'severed and tried separately' from other issues relating to liability, in accordance with this court's previous case law and Rule 23(c)(4) . . . This court has previously 'approved mass tort or mass accident class actions when the district court was able to rely on a manageable trial plan—including bifurcation' of 'class-wide liability issues' and issues of individual damages.") (citing Steering Comm. v. Exxon Mobil Corp., 461 F.3d 598, 603 (5th Cir. 2006)). The court also cited with approval the Seventh Circuit's opinion in Butler v. Sears, Roebuck & Co., stating, "[A] class action limited to determining liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members, or homogeneous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed." Butler v. Sears, Roebuck & Co., 727 F.3d 796, 800 (7th Cir. 2013). Not once did the court cite *Castano.*

III. The Seventh Amendment Should Not Present A Bar To Issue Certification

Ever since *Rhone Poulenc*, defendants facing an issue certification routinely present the Seventh Amendment "reexamination clause" argument as the last line in a parade of horribles.[70] But consider the layers of speculation that underlie the supposed reexamination violation. For example, the *Castano* court stated:

> Another factor weighing heavily in favor of individual trials is the risk that in order to make this class action manageable, the court will be forced to bifurcate issues in violation of the Seventh Amendment. This class action is permeated with individual issues, such as proximate causation, comparative negligence, reliance, and compensatory damages . . . .
> . . . .
> . . . At a bare minimum, a second jury will rehear evidence of the defendant's conduct. *There is a risk* that in apportioning fault, the second jury *could* reevaluate the defendant's fault, determine that the defendant was not at fault, *and apportion 100% of the fault to the plaintiff*. In such a situation, the second jury would be impermissibly reconsidering the findings of a first jury. *The risk* of such reevaluation is so great that class treatment can hardly be said to be superior to individual adjudication.[71]

70. *See, e.g.*, IMI Defendants' Memorandum in Opposition to Plaintiffs' Motion for Class Certification and in Support of Motion to Exclude Expert Testimony and Opinion of Dr. John Beyer at 30 n.48, 55, *In re* Ready-Mixed Concrete Antitrust Litig., No. 1:05-cv-00979-SEB-JMS, 2008 WL 2548951 (S.D. Ind. April 7, 2008) (stating that "because impact/injury is an element of liability, the Seventh Amendment prohibits" bifurcation of damages.); Defendants' Motion to Decertify the Class at 16, *In re* Nw. Airlines Corp. Antitrust Litig., No. 2:96-cv-74711-GCS, 2005 WL 3677173 (E.D. Mich. Aug. 19, 2005) ("Whether and to what extent an individual class member was reimbursed goes directly to the issue of whether that class member was injured by the alleged conduct. Because the trial jury will be asked to decide on a classwide basis whether individual class members have been injured, subsequent determinations by a different factfinder in a 'reimbursement proceeding' would entail constitutionally impermissible reexamination of issues addressed by the trial jury.").

71. Castano v. Am. Tobacco Co., 84 F.3d 734, 750-51 (5th Cir. 1996) (emphasis

The emphasized words above highlight the nature of the possible "reexamination." Instead of conjecture, the court considering an issue certification should remember "ripeness," "standing," and "waiver." Because a potential reexamination clause violation can only appear after the plaintiffs prevail in the initial trial and a second jury fails to heed the trial court's instructions to consider only the issues before it, any Constitutional infraction can only be ripe *after* a class plaintiffs' victory. Thus, under the doctrines of ripeness and standing, no defendant could mount a legitimate Constitutional attack to issue certification at the time

added). While the Fifth Circuit has stood by *Castano*, *see, e.g.*, Allison v. Citgo Petroleum Corp., 151 F.3d 402, 420 (5th Cir. 1998), it has deviated in some odd situations. In Mullen v. Treasure Chest Casino, L.L.C., 186 F.3d 620 (5th Cir. 1999), the court distinguished *Castano* in upholding an issue certification of workers at a floating casino who sued for respiratory injuries related to second-hand smoke under the Jones Act. *Id.* at 629. The court's discussion of the Seventh Amendment appears to single out comparative negligence as something that could be bifurcated, unlike causation:

> In *Castano*, this Court expressed a concern that having one jury consider the defendant's conduct and another consider the plaintiffs' comparative negligence could create Seventh Amendment problems. . . .
> . . . [W]e would not find the risk of infringing upon the parties' Seventh Amendment rights significant in this case. . . . In *Castano*, we were concerned that allowing a second jury to consider the plaintiffs' comparative negligence would invite that jury to reconsider the first jury's findings concerning the defendants' conduct. We believe that such a risk has been avoided here by leaving all issues of causation for the phase-two jury. When a jury considers the comparative negligence of a plaintiff, "the focus is upon causation. It is inevitable that a comparison of the conduct of plaintiffs and defendants ultimately be in terms of causation." . . . Thus, in considering comparative negligence, the phase-two jury would not be reconsidering the first jury's findings of whether Treasure Chest's conduct was negligent or the Casino unseaworthy, but only the degree to which those conditions were the sole or contributing cause of the class member's injury. Because the first jury will not be considering any issues of causation, no Seventh Amendment implications affect our review of the district court's superiority finding.

Id. at 628-29 (citations omitted). But this distinction ignores that the first jury would still be assessing what the floating casino knew about its supposedly inadequate ventilation system, when it knew it, and whether it was negligent – all things the individual jury could reconsider in the individual phase *if* viewed the same skeptical way as the court did in *Castano*. It is unclear how the comparative negligence issue in *Mullen* avoids the risk of reexamination any differently than the negligence and general causations in *Castano*.

of class motion. Moreover, only the class plaintiffs would likely suffer from a reexamination; if the first jury found for the defendant, the case ends for every member of the class. As such, only the class plaintiffs would have standing to raise a Seventh Amendment violation.

A. *Standing When Challenging a Seventh Amendment Reexamination Violation*

Standing "is the threshold question in every federal case" and is a bedrock requirement for a litigant wishing to raise a legal right:

> In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society.[72]

The Constitutional basis for establishing standing stems from the "[Article] III judicial power [which] exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally."[73] Therefore, a "federal court's jurisdiction . . . can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action.'"[74] A "generalized grievance" is not enough; only the party harmed may "assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[75]

The standing requirement dooms the opposition of most defendants raising Seventh Amendment objections to issue certification motions. Because the *potential* of a Seventh Amendment reexamination scenario is speculative at the time a defendant opposes class certification, no actual injury has ripened.[76] Second, even if a jury did revisit the findings

72. Warth v. Seldin, 422 U.S. 490, 498 (1975).

73. *Id.* at 499.

74. *Id.*

75. *Id.* (internal citations omitted).

76. The specter of a Seventh Amendment violation untethered to an actual injury to a class defendants is displayed in Perry, *supra* note 3, at 742-43. Mr. Perry, a partner at

of the first jury, it is the class plaintiffs who are likely wronged, and the defendants cannot raise their violation to undo the class action.

1. Seventh Amendment Rights of Litigants Are Not Violated Until An Issue Has Actually Been Reexamined

Overwrought speculation about what subsequent juries may decide once the class trial moves to the next level will not suffice the "ripeness" test for standing. The *Rhone Poulenc* court overemphasized a potential conflict before one developed.[77] In *Lujan v. Defenders of Wildlife*, the Supreme Court laid out specific requirements which must be met in order for a plaintiff to claim a violation of their Constitutional rights.[78] Primary among these was the element of personal injury.[79] Specifically, the Supreme Court found that in order to establish a personal injury, a litigant must show that they are actually harmed by the Constitutional violation.[80] Moreover, the harm must be "actual or imminent, not conjectural or hypothetical."[81]

The possibility that a second jury could reexamine the findings of the first does not meet the "actual or imminent" requirement to establish personal injury. Both juries can examine overlapping evidence; the reexamination clause only prohibits the second jury from deciding factual issues that were common to both trials *and* essential to the

Gibson Dunn who represents large defendants in class actions, simply notes that the *potential* for a reexamination raises sufficient "concerns" to support complete rejection of issue certification to avoid any constitutional conflict:

> The Reexamination Clause forbids two separate jury trials for the same claims and facts. As the Court has stated in interpreting this Clause, two jury trials may not be used for the same case "unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." Claim elements and defenses, however, are not "distinct and separable" from liability. . . . Therefore, "partial certification" raises significant constitutional concerns, and the rule of constitutional avoidance counsels against an expansive use of Rule 23(c)(4).

Perry, *supra* note 3, at 742-43.

77. *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995).
78. Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992).
79. *Id.* at 578.
80. *Id.*
81. *Id.* at 560 (internal quotation marks omitted).

outcome.[82] Neither the plaintiffs nor the defendants are in any "imminent" danger of harm because giving a second jury the *opportunity* to potentially reexamine evidence that an initial jury already passed on does not ensure that the second jury will *actually* reexamine the legal issues and reach a contradictory verdict that deprives the initial party of its litigation victory. Regarding ripeness, the plaintiff in *Lujan* complained that by denying extraterritorial application of the Endangered Species Act to activities supported by the U.S. that threatened animals in other countries, her Constitutional rights would be violated if she were to travel to another country, as she could not make a claim.[83] However, this concern lacked imminence because she did not have any concrete plans to visit another country, nor could produce a plane ticket or a planned date of travel, etc..[84] Similarly, at the time of issue certification, it is far from inevitable that a second jury *will even be used*, as the defendants might win or the case might settle.

Not only is the possibility of a "reexamination" speculative but it can be easily averted. The trial court can give verdict sheets to the juries that limit what issues they may consider.[85] The common issue jury can be given specific issues upon which to render a verdict, and the individual issue juries can be limited via verdict sheets to making findings on causation and damages. For example, in *Rhone-Poulenc*, plaintiffs alleged that the defendants were at fault for not warning their customers of the risk of HIV in their products from 1980-1985.[86] If the common issue jury held that the defendants could not have known of the risks until 1983, but an individual issue jury sided with the plaintiff, despite finding he used the products only before 1983, the trial court

82. Houseman v. U.S. Aviation Underwriters, 171 F.3d 1117, 1127-28 (7th Cir. 1999) (finding no Seventh Amendment violation where trial over airplane crash was bifurcated between suit against pilot and manufacturer; passengers distinct legal theories against defendants presented overlapping evidence that a jury could independently find both defendants' conduct were substantial factors causing the crash); *In re* Innotron Diagnostics, 800 F.2d 1077, 1085 (Fed. Cir. 1986) (bifurcation of anti-trust and patent claims upheld despite likelihood that "most of the facts and issues in the patent trial [were] overwhelmingly intertwined and overlapping with those in [the anti-trust claim]."); Paine, Webber, Jackson & Curtis, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 587 F. Supp. 1112, 1117 (D. Del. 1984) (noting that the Seventh Amendment is concerned about factual conclusions, not evidence: "The prohibition is not against having two juries review the same *evidence*, but rather against having two juries *decide* the same *essential issues*.").

83. *Lujan*, 504 U.S. at 588.

84. *Id.* at 592.

85. *See, e.g.*, FED. R. CIV. P. 50.

86. *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1296 (7th Cir. 1995).

could throw out the contradictory verdict.[87] This coincides with the more recent and refined "backstop" understanding of the "individual issues" jury that Judge Posner described in *Mejdrech.*[88] If the class jury held defendants were responsible for a groundwater plume that included plaintiff's property, but the individual jury found the plaintiff failed to show any contamination (or any actual damages due to the contamination), the second jury has not "reexamined" the first jury's verdict in a manner that violates anyone's Constitutional rights, let alone that of the defendant. In addition, if needed, the defendant could also move for judgment as a matter of law to enforce the specific terms of the first jury's intended verdict.[89]

2. The Reexamination Violation, if it Ever Arose, Would Most Likely Affect the Class Plaintiffs, and Defendants would Lack Standing to Object

The *Rhone-Poulenc* court reasoned that reexamination of an issue could occur if the plaintiffs were to receive a favorable verdict from the initial jury at the issue-class trial, and then if subsequent juries chose to reexamine that favorable verdict when they decided the remaining issues of each plaintiff's respective case.[90] But, if the plaintiffs lost the certified issue of negligence, there would be no subsequent trials to determine damages, and no risk of reexamination of the issues. In fact, it is likely that in most issue certifications, the initial jury impaneled to hear the certified issues will hear threshold issues such as liability, while subsequent juries will decide subordinate issues such as damages. This means that when a subsequent jury is impaneled, the defendant has already been found liable for something, leaving the subsequent jury to

87. *See* Simon v. Phillip Morris Inc., 200 F.R.D. 21, 33 (E.D.N.Y. 2001) (noting that trial judges have historically been allowed to use procedural devices to exert control over jury verdicts, including "remittitur, new trial, judgment notwithstanding the verdict, demurrer to the evidence, directed verdict, special verdict and nonsuit."); Woolley, *supra* note 15, at 528 (noting prevention of contradictory verdicts, "can be achieved in the bifurcation context by requiring that the formal findings of a jury be given estoppel effect. Provided later juries respect the rules of direct estoppel, the second phase of a bifurcated proceeding cannot be used to evade limits on review.").

88. Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910, 912 (7th Cir. 2003).

89. *See* Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 546 U.S. 394, 396 (2006) (stating that "a party in a civil jury trial that believes the evidence is legally insufficient to support an adverse jury verdict will seek a judgment as a matter of law").

90. *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1303 (7th Cir. 1995).

decide individual matters like causation and damages[91] or whether the plaintiff relied on a misrepresentation.[92] At this point, there are only two options for the subsequent jury: either it can accept the verdict of liability that the initial jury found during the class trial (this is what it must do as a matter of law, and what it is presumed to do);[93] or it can "go rogue," and potentially violate the Seventh Amendment by reexamining and negating the findings of the first jury. On the remote chance the subsequent jury "goes rogue", then the only party that can be harmed is the previously victorious class plaintiff. The defendant is not harmed by the reexamination but instead gets a windfall – thereby lacking standing to complain.

B. *Constitutional Rights, Such as Those Granted by the Seventh Amendment, May Be Waived*

"Although the right to a jury trial is guaranteed by the Seventh Amendment to the United States Constitution, like all Constitutional rights it can be waived by the parties."[94] This is especially well settled in civil litigation, where "[u]nlike other Constitutional rights, however, an intentional relinquishment of the right is not required for waiver; the right to a jury trial can be waived by inaction or acquiescence."[95] The waiver of a Constitutional right is enforceable so long as it is made knowingly and voluntarily.[96] In fact, many of the rights accorded by the Bill of Rights can be waived under the same "voluntary, knowing, and informed" standards.[97]

91. Hilao v. Estate of Marcos, 103 F.3d 767, 772 (9th Cir. 1996) (holding district court correctly ordered a trifurcated trial–one trial for issues of liability, "one trial on exemplary damages and one on compensatory damages").

92. *See, e.g.*, Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004); *In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 141 (2d Cir. 2001).

93. Tennessee v. Street, 471 U.S. 409, 415 (1985) (endorsing the "crucial assumption that the jurors followed the instructions given them by the trial judge") (quoting Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983)) (internal quotation marks omitted); Woolley, *supra* note 15, at 526 n.136 (noting "the most invariable assumption of the law that jurors follow their instructions") (citing Richardson v. Marsh, 481 U.S. 200, 206 (1987)).

94. *In re* City of Phila. Litig., 158 F.3d 723, 726 (3d Cir.1998) (citing United States v. Moore, 340 U.S. 616, 621 (1951)).

95. *Id.* at 726.

96. Brady v. United States, 397 U.S. 742, 748 (1970).

97. *See, e.g.*, Montejo v. Louisiana, 556 U.S. 778, 786 (2009) ("Our precedents also place beyond doubt that the Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent.");

Similarly, any party that is seeking an issue certification under Rule 23(c)(4) has the ability to waive its rights under the Seventh Amendment.[98] As part of their motion to certify (in an abundance of caution), the plaintiffs who seek issue certification could waive their Seventh Amendment right against reexamination upfront, removing this potential problem and possible defense objection. As part of the trial courts' examination of adequacy of counsel, the court can assess if the waiver was made knowingly, voluntarily, and intelligently. This assessment may occur at the class hearing, and the class representatives can be asked about waiving any reexamination issues during their depositions.

IV. Conclusion

Issue certification is not always appropriate. It may be that litigating the common issues fails to appreciably save any resources, or that small individual damages cannot incentivize a consumer to step forward and sue, even armed with a liability verdict. Also, there must be some mechanism to ensure fair compensation for the class counsel that did the heavy lifting in trying the common issues to a successful verdict in the absence of a class fund that results when both liability and damages are tried together. But the bogeyman of the potential of a Seventh Amendment violation from a "reexamination" by a second jury has too long been a throw in argument against class certification by class defendants clinging to a "divide and conquer" strategy that favors those with greater litigation resources. Trying common issues limits the ability of a defendant to force plaintiffs to relitigate issues, dissipating some of their advantage. Based upon the well-settled law of standing and ripeness, the Seventh Amendment's reexamination clause is not a reasonable basis to deny certification of common issues. Without that

Iowa v. Tovar, 541 U.S. 77, 87-88 (2004) ("While the Constitution 'does not force a lawyer upon a defendant,' it does require that any waiver of the right to counsel be knowing, voluntary, and intelligent) (internal citations omitted); Ohio v. Robinette, 519 U.S. 33, 39 (1996) (holding that the keystone to voluntary waiver of a Fourth Amendment right is the question of reasonableness).

98. Aetna Ins. Co. v. Kennedy *ex rel*. Bogash, 301 U.S. 389, 393 (1937). Of course, waiver of all Seventh Amendment rights happens constantly in America due to the proliferation of mandatory arbitration clauses in consumer and employment contracts. *See Hearing on Mandatory Binding Arbitration Agreements: Are They Fair to Consumers? Before the Subcomm. on Commercial and Admin. Law of the Comm. on the Judiciary*, 110th Cong. 5 (statement of F. Paul Bland, Jr., Staff Attorney); *see also* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745 (2011).

concern, the American legal system can move one step closer to the liberal standard of judicial discretion for issue certification intended by Rule 23.