Essay

Defining Common and Individual Issues in Class Actions: What a Reasonable Jury Could Do

Aaron D. Van Oort and John L. Rockenbach†

INTRODUCTION

The distinction between common and individual issues is the single most important concept in the modern class action, and it is the one that most bedevils courts in practice. Rule 23(a)(2) of the Federal Rules of Civil Procedure makes the existence of at least one common issue a prerequisite for every class action,[1] and the predominance of common issues over individual ones is a prerequisite for class actions seeking money damages under Rule 23(b)(3).[2] Ever since Rule 23 was amended to take its modern form in 1966, courts have therefore been required to classify issues as common or individual. Yet to this day, they have not settled on a uniform approach for doing so, let alone explained why that approach is correct.

To advance and clarify the law, we propose that courts distinguish between common and individual issues in Rule 23 class actions by asking what a reasonable jury could do. An ***individual issue*** is an issue that a reasonable jury could resolve differently for different members of the proposed class because it could find legally material, factual differences among them. A ***common issue***, conversely, is an issue that a reasonable jury would have to resolve the same for all members of the proposed class because it could not find any legally material, factual differences among them. The facts that are *legally material* in a given case

---

† Aaron D. Van Oort is co-chair of the Appellate Practice at Faegre Drinker. John L. Rockenbach is an associate at the same firm. The authors would like to thank the Minnesota Law Review for publishing this piece.

1. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 359 (2011).
2. Comcast Corp. v. Behrend, 569 U.S. 27, 33–34 (2013).

are determined by the elements of the substantive claims and defenses at issue. And whether *factual differences* could be found depends on the full, admissible evidentiary record.

Defining common and individual issues in the way we propose, based on what a reasonable jury could do, follows directly from the limited role of procedural rules and is necessary to protect the parties' substantive rights. Under the Rules Enabling Act, a rule of procedure cannot alter substantive rights,[3] and under the Seventh Amendment to the U.S. Constitution, a rule cannot be used to deny a party its right to a jury trial.[4] The procedural constraints of a class action certification—which require a jury to decide the certified issues the same way for all class members—are therefore permissible only if a reasonable jury would have to decide the certified issues consistently in any event. Otherwise, the constraints will force the jury to vote for some plaintiffs whom it would otherwise vote against (if it reaches a plaintiff verdict) or against some plaintiffs whom it would otherwise vote for (if it reaches a defense verdict). Either way, the procedural rule would be used to deny the jury the ability to act on its findings, impermissibly altering the outcomes of individual claims and the underlying substantive rights.

If the standard we are proposing sounds familiar, that's because it directly parallels the reasonable-jury standard applied under Rules of Civil Procedure 56 and 50, which govern when judges may grant summary judgment and judgment as a matter of law at trial, respectively. Under those rules, a court may decide a merits question only if no reasonable jury could rule otherwise.[5] In the same way, a court may require merits questions to be decided the same way for every member of a Rule 23 class only if no reasonable jury could distinguish between them.

Several important practical implications for class action practice follow from understanding that common and individual issues are defined by what a reasonable jury could do.

First, classifying issues as common or individual is an objective, legal determination subject to *de novo* review on appeal, not a subjective, pragmatic determination subject to review only for abuse of discretion.

Second, and similarly, the classification of issues is conducted at the element level and is binary. Each element of a

3. *Duke*s, 564 U.S. at 367.

4. Colgrove v. Battin, 413 U.S. 149, 149 (1973).

5. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 251 (1986).

claim or defense is either a common issue or an individual issue; there is no third alternative, and balancing and discretion play no role in the analysis.

Third, an issue's classification depends on both side's evidence, not just one side's, because what a reasonable jury could do depends on the entire record before it.

Fourth, an issue's classification turns only on evidence that will be admissible, because evidence the jury will not see cannot affect what it reasonably could do.

Fifth, the standard of proof governing the analysis is the standard of proof for the underlying claim—whether preponderance of the evidence, clear and convincing evidence, or something else—because that is the standard that will constrain a reasonable jury.

Sixth, the character of an issue as individual or common persists throughout an action and is not changed by a ruling certifying a class. As long as a jury could reasonably distinguish between class members on a certain issue, it must be allowed to do so. An individual issue therefore must always be litigated individually, outside of a class, even if some other, common issues are certified for class treatment, and even if those common issues predominate.

Finally, we should note that classifying issues as common and individual does not answer the ultimate question whether a class can or should be certified—unless, of course, there are no common issues. Otherwise, discretion comes into play in making the certification decision.

We address these issues and implications in greater detail below.

I. THE NEED FOR A DEFINITION: DISTINGUISHING COMMON AND INDIVIDUAL ISSUES IN CLASS ACTIONS

One could reasonably ask why the law needs a standard for distinguishing between common and individual issues in class actions. There are two reasons, one formal and one practical.

The formal reason is that Rule 23 *requires* courts to distinguish between common and individual issues. Under Rule 23, no class action may be certified unless the case presents at least one question "of law or fact common to the class."[6] In addition, no

6. Fed. R. Civ. P. 23(a)(2); *see* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011).

class action seeking damages may be certified unless "the questions of law or fact common to class members predominate over any questions affecting only individual class members."[7] Before one can ask whether common questions exist or predominate, one must first decide what a common question is.[8] The distinction between "common" and "individual" questions is thus central to the Rule 23 analysis.[9]

The practical reason why the law needs a standard for distinguishing between common and individual issues is that courts have thus far been unable to provide one. Why the gap in the law? For starters, the text of Rule 23 points the wrong direction, asking whether there are "*questions* of law or fact common to the class,"[10] when it is not the questions but the answers that must be common to qualify an issue for group treatment.[11] The United States Supreme Court's 1974 decision in *Eisen v. Carlisle & Jacquelin*[12] exacerbated the problem by declaring that courts lacked "any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."[13] For more than 35 years, this statement deterred courts from examining the very things they needed to examine to distinguish common from individual issues: the elements of the claims and defenses and the evidence relevant to them.

In 2011, the Supreme Court cleared away these two impediments in *Wal-Mart v. Dukes*.[14] *Dukes* held that the certification analysis will often "entail some overlap with the merits of the plaintiff's cause of action," and "[t]hat cannot be helped."[15] To the extent *Eisen* suggested otherwise, the Court found it to be "the purest dictum" and furthermore "contradicted by our other cases."[16] *Dukes* also correctly held that what matters is not

---

7. Fed. R. Civ. P. 23(b)(3).

8. *See, e.g.*, 2 Newberg on Class Actions § 4.50 (5th ed.); CGC Holding Co., LLC v. Broad & Cassel, 773 F.3d 1076, 1087 (10th Cir. 2014).

9. *See* In re Petrobras Sec., 862 F.3d 250, 270 (2d Cir. 2017).

10. Fed. R. Civ. P. 23(a)(2) (emphasis added).

11. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011) (citing Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 131–32 (2009)).

12. 417 U.S. 156 (1974).

13. *Id.* at 177.

14. 564 U.S. 338 (2011).

15. *Id.* at 351.

16. *Id.* at 351 n.6.

common questions, but "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation."[17] Whether there can be common answers, *Dukes* held, depends on "[d]issimilarities within the proposed class."[18]

From *Dukes*, we know that the distinction between common and individual issues depends on dissimilarities within the proposed class. But what kind of dissimilarities matter? In *Tyson Foods, Inc. v. Bouphakeo*, the Supreme Court offered a partial definition of common and individual issues, stating: "An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.'"[19] But this statement leaves many important questions unanswered. For instance, it does not answer the question of whose evidence matters—the plaintiffs', the defendant's, or both? It does not state whether the evidence must be admitted, admissible, or merely described. It does not explain at what level variation in evidence should be assessed, whether on a claim-by-claim, element-by-element, or case-wide basis. And it does not specify to what degree evidence must vary between plaintiffs before it becomes "individual."

The circuit and district courts also have not developed a uniform standard for distinguishing common from individual issues. The cases are not consistent, for example, in describing whose evidence must be considered. Many decisions focus on the evidence that the plaintiffs will present, asking whether they can make a prima facie showing relying only on common evidence.[20] Other decisions, however, consider the evidence the

17. *Id*. at 351 (quoting Nagareda, 84 N.Y.U. L. REV. at 132).

18. *Id*. at 351(quoting Nagareda, 84 N.Y.U. L. REV. at 132).

19. 577 U.S. 442, 453 (quoting 2 W. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4.50 (5th ed. 2012)).

20. *See, e.g.*, Reinig v. RBS Citizens, N.A., 912 F.3d 115, 127–28 (3d Cir. 2018); Torres v. Mercer Canyons Inc., 835 F.3d 1125, 1134 (9th Cir. 2016); Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 812 (7th Cir. 2012); Wade v. JMJ Enterprises, No. 1:21CV506, 2023 WL 6391683, at *8 (M.D.N.C. Sept. 30, 2023). The Eighth Circuit, in particular, has frequently framed the question this way. *E.g.*, In re State Farm Fire and Casualty Co., 872 F.3d 567, 572 (8th Cir. 2017) ("The preliminary predominance inquiry requires 'rigorous analysis' of whether 'the same evidence will suffice for each member to make a prima facie showing' that the insurance contract was breached . . . ." (quotation omitted)); In re Zurn Pex Plumbing Prod. Liab. Litig., 644 F.3d 604, 618 (8th Cir.

defendant will present as well.[21] The cases also vary in how they describe what kind of individual evidence it takes to make an issue individual rather than common. Some decisions state that if the factual differences are only "minor," the issue may still be common.[22] Other decisions state that, if only a relatively few class members will be affected by the individual evidence, the issue may still be common.[23] Other decisions blur the distinction between classifying issues as common or individual and determining whether common issues predominate by asking whether individual evidence would predominate as to a particular issue.[24] The lack of any uniform standard for distinguishing between common and individual issues, much less a common explanation for such a standard, points to a gap in the law that should be filled.

II. OUR PROPOSED DEFINITION: WHAT A REASONABLE JURY COULD DO

In our view, common and individual issues under Rule 23 are defined by what a reasonable jury could do:

2011) ("Common questions are those for which a prima facie case can be established through common evidence."); Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023, 1029 (8th Cir. 2010) ("If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question."); Blades v. Monsanto Co., 400 F.3d 562, 566 (8th Cir. 2005) ("If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question.").

21. *See* In re Asacol Antitrust Litig., 907 F.3d 42, 51–58 (1st Cir. 2018); In re St. Jude Medical, Inc., 522 F.3d 836, 839–40 (8th Cir. 2008).

22. *See* Fangman v. Genuine Title, LLC, 2016 WL 6600509, at *9 (D. Md. Nov. 8, 2016) (noting that even if individualized examination was required to determine whether illegal referrals occurred for individual loans, "[m]inor differences in the underlying facts of individual class members' cases do not defeat a showing of commonality where there are common questions of law"); Balasanyan v. Nordstrom, Inc., 294 F.R.D. 550, 560 (S.D. Cal. 2013) ("Minor variations on a theme . . . should not contain the seeds of destruction for a putative class.").

23. *See* Krakauer v. Dish Network L.L.C., 311 F.R.D. 384, 396–97 (M.D.N.C. 2015); *see also* Torres v. Mercer Canyons Inc., 835 F.3d 1125, 1136 (9th Cir. 2016) ("[E]ven a well-defined class may inevitably contain some individuals who have suffered no harm as a result of a defendant's unlawful conduct."); In re Nifedipine Antitrust Litig., 246 F.R.D. 365, 369 (D.D.C. 2007) ("In order to demonstrate that common evidence exists to prove class-wide impact or injury, plaintiffs do not need to prove that every class member was actually injured.").

24. *See, e.g.,* Menocal v. GEO Grp., 882 F.3d 905, 921 (10th Cir. 2018).

An ***individual issue*** is an issue that a reasonable jury could resolve differently for different members of the proposed class because it could find legally material, factual differences among them.

A ***common issue***, conversely, is an issue that a reasonable jury would have to resolve the same for all members of the proposed class because it could not find any legally material, factual differences among them.

The facts that are *legally material* in a given case are determined by the elements of the substantive claims and defenses at issue. And whether material *factual differences* could be found to exist depends on the admissible evidentiary record, because Rule 23 "does not set forth a mere pleading standard."[25]

To illustrate our definition, let us give two examples, starting with an example of an individual issue. In *Mazza v. American Honda Motor Co.*, the plaintiffs alleged that Honda had misrepresented the characteristics of a Collision Mitigation Braking System in advertising for Acura RLs.[26] An element of their claim required plaintiffs to prove that each purchaser was exposed to the alleged misrepresentation.[27] Under our analysis, that makes exposure a legally material fact. In its opinion, the U.S. Court of Appeals for the Ninth Circuit found it "likely that many class members were never exposed to the allegedly misleading advertisements, insofar as advertising of the challenged system was very limited."[28] Under our analysis, that means that a reasonable jury could find legally material, factual differences among class members—specifically, that some purchasers were exposed to the alleged misrepresentation and some were not. Consequently, the court correctly found exposure to be an individual issue.[29]

As an example of a common issue, consider *DiFelice v. U.S. Airways, Inc.*,[30] in which an ERISA plan participant argued that his employer, the plan sponsor, had breached its duty to select investment options prudently by allowing its parent company's stock to remain as an option in the plan while it declared bankruptcy. The district court found that "the resolution of this

25. Wal-Mar Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011).
26. Mazza v. American Honda Motor Co., 666 F.3d 581 (9th Cir. 2012),
27. *Id.* at 596.
28. *Id.* at 595.
29. *Id.* at 596.
30. DiFelice v. U.S. Airways, Inc., 235 F.R.D. 70 (E.D. Va. 2006).

[prudence] question does not depend on which participant brings the action on behalf of the Plan."[31] Under our analysis, this finding means that a reasonable jury would have to resolve the prudence question the same for every class member, at least for a particular point in time, since it could find no material, factual differences among them at that point in time.

III. WHY A REASONABLE-JURY DEFINITION IS CORRECT: THE LIMITS ON PROCEDURAL RULES

Defining common and individual issues based on what a reasonable jury could do follows directly from the proper role of procedural rules.

As relevant to this discussion, there are two primary limitations on the permissible role of a procedural rule, one statutory and one constitutional. First, the Rules Enabling Act prohibits procedural rules from abridging, enlarging, or modifying any substantive right.[32] Second, the Seventh Amendment to the U.S. Constitution guarantees parties the right to a jury trial.[33]

In a series of decisions, the Supreme Court has applied these limitations to Rules 56 and 50, governing when a court may take issues away from a jury by granting summary judgment and judgment as a matter of law at trial.[34] From these cases, a few core principles emerge. First, a rule of procedure that deprives a party of its right to a trial by jury violates the Seventh Amendment.[35] Second, the Seventh Amendment protects "the *substance* of the common law right of trial by jury, as distinguished from mere matters of form or procedure."[36] Third, a rule of procedure protects the substance of the right to a jury trial when its use is limited to situations where a party's evidence is legally

31. *Id*. at 78.

32. The Rules Enabling Act gives the United States Supreme Court "the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts," provided that "[s]uch rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(a), (b).

33. U.S. CONST., amend. VII.

34. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–89, (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Galloway v. United States, 319 U.S. 372, 388–96 (1943); Baltimore & Carolina Line v. Redman, 295 U.S. 654, 658–60 (1935).

35. *See* 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2302.4; Fidelity & Deposit Co. of Maryland v. United States, 187 U.S. 315, 320 (1902).

36. Colgrove v. Battin, 413 U.S. 149, 156 (1973) (emphasis added).

insufficient to support a jury verdict.[37] If, however, the law and evidence would allow a reasonable jury to find for a party, courts agree that taking the issue away from the jury infringes on the Seventh Amendment.[38]

By now, the application of these principles to motions for summary judgment and judgment as a matter of law is well understood. At summary judgment, a court must determine whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[39] To apply this standard, the court must draw all reasonable inferences in favor of the nonmoving party, then decide whether the evidence would be sufficient to support a finding for that party on the challenged claim or element.[40] The same standard governs a directed verdict under Rule 50(a), which calls for the judge to grant judgment as a matter of law unless "reasonable minds could differ as to the import of the evidence."[41] The only difference between trial and summary judgment is the factual record to which the reasonable-jury standard is applied.

The very same reasonable-jury standard that courts know so well from Rules 56 and 50 applies equally to Rule 23. The Rules Enabling Act applies to Rule 23 just as it does to other procedural rules.[42] As the Supreme Court has recognized, if Rule 23 were applied so as to give "plaintiffs and defendants different rights in a class proceeding than they could have asserted in an

---

37. *See* Galloway v. United States, 319 U.S. 372, 388–96 (1943) (upholding directed verdict against Seventh Amendment challenge); Baltimore & Carolina Line v. Redman, 295 U.S. 654, 658–60 (1935) (same); Calvi v. Knox Cty., 470 F.3d 422, 427 (1st Cir. 2006) (holding that the Seventh Amendment's jury trial right "exists only with respect to genuinely disputed issues of material fact").

38. *See, e.g.*, Hobbs v. Lockhart, 46 F.3d 864, 868 (8th Cir. 1995) (holding that directed verdict denied plaintiff his right to a jury trial when evidence supported the plaintiff's case).

39. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); *see also* Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

40. Scott v. Harris, 550 U.S. 372, 378 (2007); *Liberty Lobby*, 477 U.S. at 254; United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

41. 477 U.S. at 250–51.

42. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612–13 (1997) ("Rule 23's requirements must be interpreted in keeping . . . with the Rules Enabling Act."); Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999) ("As we said in *Amchem*, no reading of the Rule [23] can ignore the [Rules Enabling] Act's mandate . . . .").

individual action," it would violate the Rules Enabling Act.[43] The Seventh Amendment right to a jury trial likewise applies to class actions certified under Rule 23.[44] Like summary judgment and judgment as a matter of law, class certification implicates the Seventh Amendment because it may take issues away from the jury's consideration.[45] Specifically, once a claim or issue is certified for class treatment, the jury is prohibited from reaching different conclusions for different individual plaintiffs. This type of procedural constraint cannot be used to improperly remove a question from the jury's province.

The existing case law makes it clear that class certification does not present a Seventh Amendment problem if a *reasonable* jury could not distinguish between individual class members in any event. But it makes it equally clear that, if the claims of individual plaintiffs *could be* reasonably distinguished, then someone's substantive rights will be violated by an order certifying a class for those claims, regardless of the outcome.[46] Either some class members who would otherwise lose will receive a windfall and the defendant's rights will be violated (if the jury reaches a plaintiff verdict), or some class members who would otherwise win will be denied recovery and their rights will be violated (if the jury reaches a defense verdict). The reasonable-jury standard prevents that impermissible outcome by barring class-wide resolution of issues whenever a jury could reasonably reach a different decision for some class members versus others.

The law governing summary judgment and judgment as a matter of law also explains how to determine which facts are material, what evidence the court should examine, and what quantum of evidence is required to identify a genuinely disputed issue

---

43. Tyson Foods v. Bouaphakeo, 577 U.S. 442, 459 (2016); *see also* Wal-Mar Stores, Inc. v. Dukes, 564 U.S. 338, 367 (2011) ("[A] class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims.").

44. Ross v. Bernhard, 396 U.S. 531, 533–41 (1970).

45. *See* Ortiz v. Fireboard Corp., 527 U.S. 815, 845–46 (1999); Cimino v. Raymark Indus., Inc., 151 F.3d 297, 319 (5th Cir. 1998).

46. *See Cimino*, 151 F.3d at 319 (reversing class judgment because causation was submitted for class determination when it was an individual issue and "the Seventh Amendment gives the right to a jury to make that determination"); In re NCAA I-A Walk-On Football Players Litig., 2006 WL 1207915, at *13 (W.D. Wash. May 3, 2006) (denying class certification where individual issues on injury and damages predominated and "Plaintiffs suggest no way to deal with each purported class member's Seventh Amendment right to have his damages determined by a jury").

that a jury must be allowed to decide. First, as the Supreme Court has instructed in the summary judgment context, the substantive law governing the claims and defenses determines which facts are material.[47] The same is true for class certification, where "[c]onsidering whether questions of law or fact common to class members predominate begins, of course, with the elements of the underlying cause of action."[48] Under Rule 23, just as under Rules 56 and 50, a fact is material if it is relevant to determining whether a party would prevail on an element of a claim or defense.

Second, the Supreme Court has instructed in the summary judgment context that courts must consider "the record taken as a whole" to determine whether a fact is genuinely disputed.[49] The same is true for class certification, because "Rule 23 does not set forth a mere pleading standard."[50] Under both rules, the record is limited to evidence that is admissible, since a jury will never see the inadmissible evidence and thus cannot base a decision on it.[51] This proposition is well established for summary judgment and judgment as a matter of law at trial.[52] It should become equally well established for class certification.

Third, under Rules 56 and 50, a fact is genuinely disputed if a reasonable jury could find for either party as to that fact.[53] Under Rule 23, the analogous rule is that a fact is genuinely disputed if a reasonable jury could find one way for some plaintiffs but another way for other plaintiffs.[54] In summary judgment, the

47. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

48. Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809 (2011).

49. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

50. Wal-Mar Stores, Inc. v. Dukes, 564 U.S. 338, 350–51 (2011).

51. *See* Fed. R. Civ. P. 56(c)(1)(2) ("A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.").

52. *See, e.g.*, Weisgram v. Marley Co., 528 U.S. 440, 454 (2000) (in ruling on a motion for directed verdict under Rule 50, "inadmissible evidence contributes nothing to a 'legally sufficient evidentiary basis for a reasonable jury'" to find for the nonmovant); Gunville v. Walker, 583 F.3d 979, 985 (7th Cir. 2009) ("Admissibility is the threshold question because a court may consider only admissible evidence in assessing a motion for summary judgment.").

53. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248–52 (1986).

54. *See, e.g.*, Rui He v. Rom, 2016 WL 3964472, at *4 (N.D. Ohio July 25, 2016) (denying class certification because "even if a jury were to find that the Defendants fraudulently misrepresented the nature of the home and expected ROI sold to Named Plaintiff He, this determination might not be binding on a class member who saw wholly different advertising, and purchased a home

inquiry is directly on the merits—whether a reasonable jury would have to rule for one party or the other. In class certification, the inquiry is one step removed from that ultimate merits determination: it is not whether a reasonable jury would have to rule for one party or the other but rather whether the jury, having ruled one way for the named plaintiff, would also have to rule the same way for all other plaintiffs.[55] In both the summary judgment and the class action contexts, the judge determines what a reasonable jury could do based on the substantive law governing the claims and the evidentiary record. But in the class action context, the inquiry is limited to deciding whether a jury can fairly be required to resolve every plaintiff's claim in the same way.

To picture the difference between the summary judgment and class certification inquiries, imagine a case brought to resolve a dispute over who owns a marble. The governing law provides that if the marble is found to be green, it belongs to the plaintiff, but if it's found to be blue, it belongs to the defendant. What makes the case difficult is that the marble is a beautiful shade of teal. If the plaintiff moves for summary judgment, the judge will be asked whether any reasonable jury could find the teal marble to be blue, and the judge will likely deny the motion because a reasonable jury could so find and therefore rule for the defendant. Now imagine that the plaintiff moves to certify a class of 10,000 other people who also have a dispute with the defendant over the ownership of their marbles. At the class certification stage, the judge will be asked to decide, not whether a reasonable jury could find the class members' marbles to be blue, but whether a reasonable jury could find any material difference between the colors of the different marbles. If the judge finds no reasonable possibility of a material difference—for instance, because all the marbles are precisely the same shade of teal—the judge will certify the class holding, in essence, "I don't know

based on different representations"); Doll v. Chicago Title Ins. Co., 246 F.R.D. 683, 690 (D. Kan. 2007) (denying class certification where "a jury might find differently" for different class members).

55. As the Supreme Court explained in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011), because the class-certification inquiry is one step removed from deciding which party will win on the merits, conducting it does not run afoul of the Court's earlier statement that a court cannot resolve "the merits of a suit in order to determine whether it may be maintained as a class action." Eisen v. Carlisle, 417 U.S. 156, 177 (1974).

whether these teal marbles should be labeled green or blue, but whatever the answer is, it will apply to all of them."

IV: IMPLICATIONS OF A REASONABLE JURY DEFINITION

Several important implications for class action practice follow from the adoption of a reasonable-jury definition to classify common and individual issues.

First, classifying common and individual issues is an objective, legal determination, not a subjective, discretionary one. In the summary judgment context, what a reasonable jury could do is decided as a matter of law and is subject to *de novo* review on appeal.[56] The same *de novo* review should apply to a court's classifications of issues as individual or common in a Rule 23 analysis. This differs from existing practice, under which not only the ultimate class certification decision but also the district court's determinations on the individual elements of Rule 23 are reviewed only for abuse of discretion by some courts.[57] Adopting an

---

56. *See, e.g.*, Fed. R. Civ. P. 56(a) (summary judgment should be granted where if "movant is entitled to judgment as a matter of law"); Barkley, Inc. v. Gabriel Bros., 829 F.3d 1030, 1038 (8th Cir. 2016) ("We review *de novo* a district court's grant of summary judgment."); Romo v. Largen, 723 F.3d 670, 681 (6th Cir. 2013) (Sutton, J., concurring in part and concurring in the judgment) ("[T]he classic summary judgment question—could a reasonable jury rule for the plaintiff on this record as construed in his favor?— . . . raises a 'legal' question, even though it is intertwined with the facts, which is why appellate courts traditionally give fresh review to district court decisions in this area.").

57. In re Flag Telecom Hldgs., Ltd. Sec. Litig., 574 F.3d 29, 34 (2d Cir. 2009) ("In reviewing class certification under Rule 23, we apply an abuse-of-discretion standard to both the lower court's determination on certification, as well as to its rulings that the individual Rule 23 requirements have been met."); *see* Parent/Pro. Advoc. League v. City of Springfield, 934 F.3d 13, 28–31 (1st Cir. 2019) (reviewing a district court's commonality ruling for an abuse of discretion); Gonzalez v. Corning, 885 F.3d 186, 193 (3d Cir. 2018), as amended (Apr. 4, 2018) (same); Brown v. Nucor Corp., 785 F.3d 895, 902–17 (4th Cir. 2015) (same); Chavez v. Plan Benefit Servs., Inc., 957 F.3d 542, 549 (5th Cir. 2020) (same); In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig., 722 F.3d 838, 852 (6th Cir. 2013) (same); Eddlemon v. Bradley Univ., 65 F.4th 335, 339 (7th Cir. 2023); Postawko v. Missouri Dep't of Corr., 910 F.3d 1030, 1038–39 (8th Cir. 2018) (same); Stockwell v. City & Cnty. of San Francisco, 749 F.3d 1107, 1113–16 (9th Cir. 2014); Black v. Occidental Petrol. Corp., 69 F.4th 1161, 1179 (10th Cir. 2023) (same); Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1270 (11th Cir. 2009); (same). *See generally* David C. Miller, *Abuse of Discretion and the Sliding Scale of Deference: Restoring the Balance of Power Between Circuit Courts and District Courts for Rule 23 Class Certification Decisions in Oil and Gas Royalty Litigation*, 103 IOWA L. REV. 1811, 1822 (2018) (discussing current practice

objective, reasonable-jury standard for classifying common and individual issues should trigger application of *de novo* review of that determination.

Second, and similarly, the classification is conducted at the element level and is binary. The Supreme Court has already instructed that considering whether common issues predominate "begins, of course, with the elements of the underlying cause of action."[58] The proposed reasonable-jury standard further clarifies that each element of a claim or defense is *either* a common issue *or* an individual issue.[59] Many courts already follow this approach in practice, requiring that plaintiff demonstrate that "*each element* is capable of proof at trial through evidence that is common to the class."[60] As these courts implicitly acknowledge, it makes no sense to discuss whether common or individual evidence or issues predominate *within* a single element of a claim or defense. If evidence exists that would allow a reasonable jury to distinguish between members of the class on an element, that element is an individual issue. Contrary to what some courts

---

under the abuse of discretion standard and calling for clarity as to how it should apply to each component of a class certification ruling).

58. Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809 (2011).

59. *Cf.* Harnish v. Widener Univ. Sch. of Law, 833 F.3d 298, 305 (3d Cir. 2016) ("The issues in the case are defined by the elements of [the] claim."); Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1272 (11th Cir. 2009) ("It is to these elements [of the claim] that we must address the commonality and predominance inquires.").

60. Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 600 (3d Cir. 2012) (emphasis added); *see* Eddlemon v. Bradley Univ., 65 F.4th 335, 339 (7th Cir. 2023) ("To determine 'which issues are common, individual, and predominant,' the court must 'circumscribe the claims and break them down into their constituent elements.'"(alterations accepted; quotation omitted)); Brayman v. KeyPoint Gov't Sols, Inc., 83 F.4th 823, 838 (10th Cir. 2023) ("[D]etermining predominance 'requires us to survey the elements of the class's . . . claims to consider (1) which of those elements are susceptible to generalized proof, and (2) whether those that are so susceptible predominate over those that are not." (ellipsis original, quotation omitted)); *see also* Fox v. Saginaw Cnty., 67 F.4th 284, 301 (6th Cir. 2023) (vacating a district court order that did not describe any of [the] elements [of the plaintiffs' claims], let alone explain which could be proved across the board for the entire class); Brown v. Electrolux Home Prods., 817 F.3d 1225, 1235 (11th Cir. 2016) (explaining that to determine predominance the court "must first identify the parties' claims and defenses and their elements" and "then classify these issues as common questions or individual issues"); Kleen Prods. LLC. V. Int'l Paper, 306 F.R.D. 585, 593 (N.D. Ill. Mar. 26, 2015) ("[A]nalyzing each element separately is useful in isolating what questions are common . . . .").

do,[61] there is no balancing or weighing to conduct within a single issue.

Third, an issue's classification depends on the evidence that both sides will introduce, not just the plaintiffs' evidence. What a reasonable jury could do depends on the entire record before it, not just the plaintiffs' evidence.[62] That is why in the summary judgment context, once the moving party identifies the portions of the record showing an absence of a genuine issue of material fact, the non-moving party may come forward with specific facts showing that a genuine issue exists for trial.[63] This approach ensures that the entire record is reviewed, and the same approach should be applied to distinguishing common from individual issues in putative class actions. Once a plaintiff identifies record evidence that would allow a reasonable jury to decide an issue the same way for all class members, the defendant must be allowed to come forward with other evidence relevant to the same issue that would allow a reasonable jury to reach different decisions for different class members.

Because what a reasonable jury could do depends on the entire record before it, it makes no sense to say, as some courts have, that an issue is a common one if the plaintiffs can offer sufficient common evidence to support a ruling in their favor on an element.[64] That ignores half the evidence that will be in the record and thus inaccurately assesses what a reasonable jury could do. If plaintiffs present common evidence but the defendant presents individualized evidence that could allow a reasonable jury to find legally material differences among class members, the issue is an individual one and must be treated as such. Several courts have correctly expressed this view, holding, for example, that "a court performing a predominance inquiry under

61. *See, e.g.*, In re Nassau Cty. Strip Search Cases, 461 F.3d 219, 226 (2d Cir. 2006) (discussing whether common issues predominate as to "particular issues" potentially appropriate for certification).

62. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

63. *See, e.g.*, Moore v. Martin, 854 F.3d 1021, 1025 (8th Cir. 2017).

64. *See, e.g.*, In re Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 618–19 (8th Cir. 2011) (upholding class certification decision that rejected the defendant's defenses because "Plaintiffs have adduced sufficient evidence to support their theory of the case"); In re Titanium Dioxide Antitrust Litig., 284 F.R.D. 328, 346–48 (D. Md. 2012) (certifying class where "Plaintiffs will overwhelmingly rely on common evidence to prove the existence of a price-fixing conspiracy" and discounting evidence that Defendants would introduce to the contrary).

Rule 23(b)(3) may consider not only the evidence presented in the plaintiff's case-in-chief but the defendant's likely rebuttal evidence."[65]

Fourth, an issue's classification should depend only on evidence that will be admissible, because evidence that the jury will not see can play no part in affecting what it reasonably could do. Many courts have held that the Federal Rules of Evidence apply at the class certification stage.[66] A particularly important application of this principle relates to expert testimony. If the presence of expert evidence will alter what a reasonable jury could do, courts must determine whether the evidence will be admissible under Federal Rule of Evidence 702 and *Daubert*. Many circuits already require a full-fledged *Daubert* analysis at the certification stage,[67] although others undertake only a "limited"

---

65. Rodney v. Nw. Airlines, Inc., 146 F. App'x 783, 786–87 (6th Cir. 2005); *see* Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 601 (3d Cir. 2012) (explaining that a district court has an "obligation to consider all relevant evidence[,] whether offered by a party seeking class certification or by a party opposing it"); *see also* Teamsters Loc. 445 Freight Div. Pension Fund v. Bombardier Inc., 546 F.3d 196, 202 (2d Cir. 2008) (holding that a district court is required to "assess all of the relevant evidence admitted at the class certification stage"); *cf.* Gorss Motels, Inc. v. Brigadoon Fitness, Inc., 29 F.4th 839, 845 (7th Cir. 2022) ("[The predominance] analysis applies not only to the elements that plaintiffs must prove but also to affirmative defenses like prior express permission"); Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 295 (1st Cir. 2000) ("[A]ffirmative defenses should be considered in making class certification decisions.").

66. *Compare* Unger v. Amedisys Inc., 401 F.3d 316, 319 (5th Cir. 2005) ("[F]indings must be made based on adequate admissible evidence to justify class certification."), *and* Anderson Living Tr. v. WPX Energy Prod., LLC, 306 F.R.D. 312, 378 n. 39 (D.N.M. 2015) (citing cases and holding that the Federal Rules of Evidence apply to class certification hearings), *and* Allen v. Ollie's Bargain Outlet, Inc., 37 F.4th 890, 904–09 (3d Cir. 2022) (Porter, J., concurring) (discussing the textual arguments for applying the rules of evidence at certification proceedings), *with* Lyngaas v. Curaden AG, 992 F.3d 412, 428 (6th Cir. 2021) (allowing district courts to consider certain evidence not yet in an admissible form), and Sali v. Corona Reg'l Med. Ctr., 909 F.3d 996, 1003 (9th Cir. 2018) (same). *See generally* Jessica Bachetti, *The Ninth Circuit Enters the Class Certification Fray: Sali's Rejection of Evidentiary Formalism and Its Implications*, 60 B.C.L. REV. E-SUPPLEMENT II.-292, II.-293–310 (2019) (discussing the varying approaches of the circuits).

67. *See* Prantil v. Arkema Inc., 986 F.3d 570, 576 (5th Cir. 2021); In re Blood Reagents Antitrust Litig., 783 F.3d 183, 187–88 (3d Cir. 2015); Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 812 (7th Cir. 2012); Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011); Sher v. Raytheon Co., 419 F. App'x 887, 890 (11th Cir. 2011).

Daubert analysis[68] and some do not examine *Daubert* at class certification at all.[69] Although the Supreme Court has not yet decided this question, it strongly hinted in *Dukes* that a *Daubert* analysis should apply to expert testimony at the class certification stage.[70] Adopting a reasonable-jury standard for distinguishing individual and common issues makes it obvious that *Daubert* must be applied, since it is the standard of admissibility, and only admissible evidence can matter.

Fifth, the standard of proof governing the analysis is the same standard that governs the underlying claim. For claims that must be proven by a preponderance of the evidence, the court must determine whether a reasonable jury applying that standard could distinguish between class members. Put differently, it must ask whether the factual differences between class members could lead a reasonable jury to conclude that one class member has satisfied the preponderance standard and that another class member has not. For claims that must be proven by clear and convincing evidence, the court must ask whether the factual differences between class members could change the outcome under that standard. Again, this parallels the analysis governing summary judgment and judgment as a matter of law, where the Supreme Court has held that "the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits."[71] Currently, the majority of courts hold that the party moving for class certification bears the burden of proving certification requirements

68. *See* In re Zurn Plumbing Prods. Liab. Litig., 644 F.3d 604, 613 (8th Cir. 2011) (approving a "focused *Daubert* analysis which scrutinized the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence"); Ancar v. Murphy Oil, USA, Inc., 2007 WL 3270763, *1 (E.D. La. 2007) (holding that at class certification the court should only consider whether an expert's opinion is reliable and relevant to Rule 23 requirements but not conduct a conclusive *Daubert* analysis).

69. *See* Serrano v. Cintas Corp., 2009 WL 910702, *2 (E.D. Mich. 2009) (holding that a *Daubert* analysis is unnecessary at class certification stage), *aff'd* 717 F.3d 476 (6th Cir. 2013); Bert v. AK Steel Corp., 2006 WL 1071872, *7 (S.D. Ohio 2006) (same).

70. Wal-Mar Stores, Inc. v. Dukes, 564 U.S. 338, 354 (2011). ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so, but even if properly considered, [the expert's] testimony does nothing to advance respondents' case.").

71. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

by a preponderance of evidence.[72] For Rule 23 requirements such as numerosity that do not require a court to anticipate what a reasonable jury could do, a preponderance of the evidence is likely always the correct standard. But for commonality, uniformly applying a preponderance standard misconceives the inquiry. The trial court must resolve the objective, legal question of whether an issue is common. And it must frame that question using the standard of proof that governs the underlying claim.

Sixth, the decision to certify *some* issues for class treatment does not convert *all* issues into common issues, and hence it does not eliminate the need to adjudicate the individual issues individually. The character of questions as common or individual is set by the substantive law governing the claims, the facts of the case, and the limitations of the Rules Enabling Act and Seventh Amendment. A class certification ruling changes none of these inputs, so it cannot change the character of the issues. As long as a reasonable jury could distinguish between class members on a certain issue, it must be allowed to do so. Individual issues remain individual—and must be adjudicated individually, outside a class—regardless of whether the court certifies a class to address other issues in the case that are common.

Some courts appear to have erroneously assumed that, if common issues predominate, management problems arising from individual differences are cured because the certification washes away the individual issues and converts them to class issues.[73] For example, courts facing fraud claims based on a uniform representation sometimes certify the class despite acknowledging that reliance on the uniform representation could differ among class members.[74] This approach is incorrect. Reliance

---

72. *See, e.g.*, Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 665 & n.6 (9th Cir. 2022) (en banc) (collecting cases); In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307 (3d Cir. 2008).

73. *See, e.g.*, In re Linerboard Antitrust Litig., 305 F.3d 145, 160–63 (3d Cir. 2002) (certifying class despite statute of limitations issue that presented an individual question about when each plaintiff discovered the cause of action); Smilow v. Sw. Bell Mobile Sys., 323 F.3d 32, 39 (1st Cir. 2003) (certifying class despite existence of affirmative defense potentially available against individual class members); Buttonwood Tree Value Partners, LP v. Sweeney, 2013 WL 12125980, at *14 (C.D. Cal. Sept. 12, 2013) (citing cases that certified a class because of common misrepresentations despite individual discrepancies regarding loss causation, damages, and reliance).

74. *See, e.g.*, Negrete v. Allianz Life Ins. Co. of N. Am., 238 F.R.D. 482, 491–92 (C.D. Cal. Nov. 21, 2006) (certifying RICO claims based on uniform

does not become a common issue simply because a different issue—whether the representation was false or misleading—may present a common question. When only some issues are common, only those issues may be certified for class treatment. The procedural mechanism for certifying only some issues for class treatment is Fed. R. Civ. P. 23(c)(4), which allows a class to be certified "with respect to particular issues."[75]

Finally, we note that our analysis of distinguishing between common and individual issues addresses just one sub-part of the class-certification analysis, and applying our approach will not answer the ultimate question of whether a class can or should be certified—unless it shows that there are *no* common issues. In cases in which at least one common issue exists and the plaintiffs are seeking damages, discretion comes into play in determining whether common issues predominate over individual issues under Rule 23(b)(3). To make that determination, courts should ask: Is a class proceeding on the common issues practicable, permissible, and worthwhile,[76] knowing that the individual issues will have to be adjudicated individually after the class trial is finished? The court's answer to this question (absent legal errors) will be subject to review only for abuse of discretion.

---

marketing materials even though each plaintiff had to prove "that his or her reliance on this misrepresentation was the proximate cause of his or her loss").

75. Courts do not agree on the outer limits of when a Rule 23(c)(4) issue class may be appropriately certified, and we do not take sides in that debate in this article.

76. Fed. R. Civ. P. 23(b)(3) (calling for courts to consider "the class members' interests in individually controlling the prosecution or defense of separate actions"; "the extent and nature of any litigation concerning the controversy already begun by or against class members"; "the desirability or undesirability of concentrating the litigation of the claims in the particular forum"; and "the likely difficulties in managing a class action"); Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 623 (1997) ("The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."); Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453 (2016) (The predominance inquiry "asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues."); *see* Bais Yaakov of Spring Valley v. ACT, Inc., 12 F.4th 81, 89 (1st Cir. 2021) (holding that where a class action presents both individual and common issues, the district court must establish a mechanism for adjudicating the individual issues that is "'administratively feasible' and 'protective of defendants' Seventh Amendment and due process rights" (quoting In re Asacol Antitrust Litig., 907 F.3d 42, 52 (1st Cir. 2018)).

CONCLUSION

To distinguish between common and individual issues in a Rule 23 class action, courts should ask what a reasonable jury could do. If a reasonable jury could resolve an issue differently for different members of the proposed class, because it could find legally material factual differences among them, the issue is an individual one. Conversely, if a reasonable jury would have to resolve the issue in the same way for all members of the proposed class because it could not find any legally material factual differences among them, the issue is a common one. This is an objective inquiry. It is performed as to each element of a claim or defense. It is conducted based on the admissible evidence that both sides will introduce. Its outcome is binary—each issue is *either* common *or* individual. And it is reviewed *de novo*. The inquiry is a familiar one because of the analogous inquiry courts have long performed in deciding whether to grant summary judgment or judgment as a matter of law under Rules 56 and 50, and courts may draw on that rich body of law to guide their understanding of how to distinguish common from individual issues under Rule 23.

Adopting a reasonable-jury rule for distinguishing between common and individual issues will clarify the law of class actions by answering a great number of practical questions, such as whose evidence should be considered in the analysis, whether an expert's opinion must be admissible to be considered, and whether a finding that some issues are common allows the court to treat other issues as common. For other questions, the reasonable-jury rule will contribute to the analysis but not answer it. For example, the question of whether the common issues in a case predominate over the individual issues for purposes of certifying a class under Rule 23(b)(3) becomes clearer once the persistence of individual issues is understood, but the ultimate question will remain and be subject to the court's discretion.