

NOTE

DISORDER CERTIFYING A CLASS: MISINTERPRETATIONS OF RULE 23(c)(1)(B) AND A PROPOSED ALTERNATIVE

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INTRODUCTION

A 2003 amendment to the Federal Rules of Civil Procedure added a partially “unclear” provision to the rule governing class actions.¹ Rule 23(c)(1)(B) now obligates judges to “define . . . the class claims, issues, or defenses” when drafting orders to certify a class.² This demand for definition marks either a “substantive” modification of class-certification prerequisites or “merely a mechanical change in the way orders are drafted.”³ Guided by the U.S. Court of Appeals for the Third Circuit, federal courts have begun to interpret Rule 23(c)(1)(B) as reflecting the former.⁴ The leading opinion, *Wachtel v. Guardian Life Insurance Co. of America*, treats the Rule as necessitating “a complete list” to

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¹ See John H. Beisner, Written Statement Before the Advisory Comm. on Civil Rules, Pub. Hearing on Proposed Amendments 5 (Jan. 22, 2002) (on file with Admin. Office of the U.S. Courts, Rules Comm. Support Office at file No. 01-CV-027).

² Fed. R. Civ. P. 23(c)(1)(B).

³ Comm. on Civil Litig. of the U.S. Dist. Court for the E. Dist. of N.Y., Report of the Committee on Civil Litigation of the U.S. District Court for the Eastern District of N.Y. Regarding the Proposed 2001 Amendments to Rules 23 and 53 of the Federal Rules of Civil Procedure and Rules 608 and 804 of the Federal Rules of Evidence 2 (2001) (on file with Admin. Office of the U.S. Courts, Rules Comm. Support Office at file No. 01-CV-056).

⁴ 2 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 7:15 (6th ed. 2010) (“[C]ourts and practitioners should expect that [the Third Circuit] requirement is now the norm.”).

explain “the full scope and parameters” of all issues expected to arise in class-wide litigation.⁵ While influential, that opinion was wrongly decided. The text, history, and purposes of Rule 23(c)(1)(B) reveal that its requirements are far more limited.

“Claims, issues, or defenses” is not a superfluous synonym for “details”; it is a term of art highlighting the three types of classes authorized by Rule 23—plaintiff classes pursuing entire claims, issue-specific classes under Rule 23(c)(4), and mandatory-defendant classes. The phrase also is disjunctive, signifying that only claims or issues or defenses need be defined. Which item to define depends on which type of class the court approves. In the ordinary case involving claims by plaintiffs, definition entails no more than specifying which claims are certified. An order certifying “all of plaintiffs’ claims” or “Counts I and IV of the plaintiffs’ complaint” easily complies with Rule 23(c)(1)(B), and nothing resembling a list that captures “the litigation’s contours at the time of class certification” is necessary.⁶

The practical difference between the Rule’s narrow meaning and the prevailing appellate interpretation is substantial, as the outcome of *Wachtel* demonstrates. In that case, the Third Circuit vacated a certification order because it lacked the form and content supposedly required by Rule 23(c)(1)(B).⁷ Although the defendants trumpeted this result as a great victory,⁸ they soon learned otherwise. Since the Third Circuit did not address the merits of class certification and remanded solely for redrafting of the order, the district court responded by composing a list of nineteen “issues [to] be treated on a class basis” and then reinstated the class without reconsidering a single point of its prior analysis.⁹ Two years af-

⁵ 453 F.3d 179, 185 (3d Cir. 2006).

⁶ *Contra id.* at 186.

⁷ *Id.* at 189–90.

⁸ Press Release, Morgan Lewis & Bockius LLP, Morgan Lewis Wins Appeal in Groundbreaking Case of First Impression on Class Certification (July 5, 2006), http://www.morganlewis.com/pubs/LIT_FirstImpression_LF_05jul06.pdf [hereinafter Press Release].

⁹ *Wachtel v. Health Net*, No. 01-4183, 2006 U.S. Dist. LEXIS 98168, at *4–7 (D.N.J. Sept. 25, 2006). The Third Circuit declined to review the amended certification order. See *Wachtel v. Health Net*, Nos. 01-4183 & 03-1801, 2007 WL 1101436, at *1 n.7 (D.N.J. Apr. 10, 2007) (recounting post-appeal procedural history).

ter their “[g]roundbreaking”¹⁰ win in the Third Circuit, the defendants settled for \$215 million.¹¹

Beyond the immediate consequences for the *Wachtel* defendants, the decision has encouraged wasteful motion battles within and outside the Third Circuit over the sufficiency of detail in certification orders.¹² One such battle has already culminated in a petition to the United States Supreme Court,¹³ and Rule 23(c)(1)(B) now “seems ripe for [further] litigation and interlocutory appeals.”¹⁴ An added complication is that *Wachtel* offers only vague guidance about the minimum degree of elaboration needed to satisfy the Rule. Courts applying *Wachtel* are therefore apt to vacate an order one day and affirm a nearly identical order the next.¹⁵

In light of its deficiencies, *Wachtel* should be overruled by the Third Circuit and rejected by courts elsewhere. To that end, this Note aims to expose the decision’s flaws while supplying an alternative interpretation of Rule 23(c)(1)(B). Part I contextualizes the Rule by reviewing the basics of class-action procedure. Part II summarizes the growing collection of opinions applying the Rule and describes the disarray caused by widespread misinterpretation. Part III examines the Rule’s text, drafting history, and purposes to clarify its intended meaning. In urging the abandonment of *Wachtel*, this Note does not argue that district courts should sidestep troublesome facts and legal questions likely to complicate the maintenance of a suit as a class action; many policy considerations undoubtedly support early attention to the thorniest issues destined for class-wide resolution. This Note instead concludes that Rule 23(c)(1)(B) can be satisfied in perfunctory fashion and that

¹⁰ Press Release, *supra* note 8.

¹¹ *McCoy v. Health Net*, 569 F. Supp. 2d 448, 452, 480 (D.N.J. 2008) (approving settlement in *Wachtel* and two related cases).

¹² See, e.g., *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 38–41 (1st Cir. 2009); *Gregurek v. United of Omaha Life Ins. Co.*, No. CV 05-6067-GHK (FMOx), 2009 WL 4723137, at *3 (C.D. Cal. Nov. 10, 2009); *Jenkins v. Hyundai Motor Fin. Co.*, No. C2-04-720, 2008 WL 2268319, at *3–4 (S.D. Ohio June 2, 2008); *In re Urethane Antitrust Litig.*, 237 F.R.D. 440, 445–46 (D. Kan. 2006).

¹³ *Petition for Writ of Certiorari, Harper v. Dart*, No. 09-026 (U.S. Feb. 1, 2010), cert. denied 130 S. Ct. 1910 (2010).

¹⁴ John C. Coffee, Jr. & Daniel Wolf, *Class Certification: Developments over the Last Five Years 2004–2009*, 10 *Class Action Litig. Rep.* (BNA) S-3, S-42 (Nov. 13, 2009).

¹⁵ See *infra* Subsection II.A.3.

Wachtel, by requiring more, confuses the mechanics of class certification and diverts attention from more important matters.

I. RULE 23(C)(1)(B) IN CONTEXT: AN OVERVIEW OF CLASS ACTIONS

For centuries, courts have applied equitable principles “to facilitate the adjudication of disputes involving common questions and multiple parties in a single action.”¹⁶ Modern class actions perform the same function through rule-bound procedural mechanisms rather than flexible equitable devices. In federal cases, Rule 23 permits courts to resolve shared disputes en masse by grouping similarly aggrieved people into classes, selecting some of them to represent the others, and reaching a decision applicable to all.¹⁷ A high-profile example is *Dukes v. Wal-Mart Stores*, in which a district court certified a class of more than one million female employees to sue the retailer for alleged sex-based discrimination in promotions and pay.¹⁸ In theory, one or all of the women could have pursued their own suits, but litigation costs and the limited scope of recovery would have prevented many from doing so. By allowing the women’s claims to proceed collectively, however, Rule 23 creates financial incentives to sue.¹⁹

Under Rule 23, courts may authorize individual plaintiffs to assert common claims on behalf of similarly situated people.²⁰ Likewise, Rule 23(c)(4) permits representative plaintiffs to litigate particular issues for the class even if other issues will be determined in separate actions.²¹ Courts also may appoint individual defendants

¹⁶ 7A Charles Alan Wright et al., *Federal Practice and Procedure* § 1751 (3d ed. 2005); see also Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* 38–39 (1987).

¹⁷ Many states have adopted all or parts of Rule 23 to govern class actions in state courts, see Robert H. Klonoff & Edward K.M. Bilich, *Class Actions and Other Multi-Party Litigation* 439 (2000), and some states have added provisions resembling Rule 23(c)(1)(B) to their own rules of procedure. See, e.g., Ark. R. Civ. P. 23(b); N.J. R. Ct. 4:32-2(a).

¹⁸ 222 F.R.D. 137, 141–42, 144, 188 (N.D. Cal. 2004).

¹⁹ See John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 *Notre Dame L. Rev.* 1419, 1419 (2003).

²⁰ Fed. R. Civ. P. 23(a).

²¹ 7AA Charles Alan Wright et al., *Federal Practice and Procedure* § 1790 (3d ed. 2005).

to represent others with related defenses to plaintiffs' charges.²² Defendant classes typically are formed at plaintiffs' request because a judgment rejecting the class defenses will prevent class members from raising those defenses in subsequent one-on-one suits.²³ Regardless of the type of class certified, Rule 23 regulates class litigation with great detail. The Rule contains two primary sections. The first section, consisting of Rules 23(a) and (b), guides courts as to whether class certification is proper; the second section, spanning the remainder of Rule 23, instructs courts on how to manage technical points after deciding to certify a class.²⁴

A. Rules 23(a) and (b): Whether to Certify a Class

Before certifying a proposed class action, a judge must engage in "rigorous analysis" to conclude whether the class fulfills four prerequisites named in Rule 23(a).²⁵ First, the class must have so many members that joinder is impractical. Second, some legal or factual questions have to unite the class. Third, the parties representing the class must assert claims or defenses typical of the class. Finally, the representatives need to adequately protect class interests.²⁶ Even if those conditions are met, Rule 23(b) restricts class certification to four types of cases. The first two types are uncommon and exist only when individual suits threaten to deplete limited sources of recovery or to impose contradictory standards of conduct on the same defendant.²⁷ The third type involves allegations that defendants' behavior has entitled class members to uniform injunctive or declaratory relief.²⁸ When the circumstances necessary

²² Nelson Rodrigues Netto, *The Optimal Law Enforcement with Mandatory Defendant Class Action*, 33 *U. Dayton L. Rev.* 59, 76–97 (2007) (recounting the history of defendant class actions and explaining the application of Rule 23 to defendant classes); Barry M. Wolfson, *Defendant Class Actions*, 38 *Ohio St. L.J.* 459, 459–60 & n.4 (1977) (citing example cases).

²³ Note, *Defendant Class Actions*, 91 *Harv. L. Rev.* 630, 637 (1978).

²⁴ Scott Dodson, *Subclassing*, 27 *Cardozo L. Rev.* 2351, 2377–78 (2006).

²⁵ *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982).

²⁶ Fed. R. Civ. P. 23(a).

²⁷ Fed. R. Civ. P. 23(b)(1); 7AA Charles Alan Wright et al., *Federal Practice and Procedure* § 1772 (3d ed. 2005) (describing the categories); Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 *N.Y.U. L. Rev.* 74, 82, 94 (1996) (reporting that only ten percent of classes are of the Rule 23(b)(1) variety).

²⁸ Fed. R. Civ. P. 23(b)(2).

for the first three types of class actions are not present, an action may still be certified if common issues predominate over individual issues and render class resolution superior.²⁹ Litigants often dispute whether a class is of the injunctive type or the common-issues type because invoking the latter triggers additional substantive requirements, mandates the distribution of expensive notifications to class members, and permits class members to opt out of the suit.³⁰

In the *Wal-Mart* case, for instance, the defendant offered three reasons why Rule 23 disallowed the creation of a potential 1.5-million-member class encompassing current and former employees in 3,400 stores.³¹ According to Wal-Mart, the named plaintiffs had claims atypical of other class members and failed to establish that significant questions of law or fact were common to the purported class.³² In addition, Wal-Mart argued that the class was not of the injunctive type and therefore could not be certified under Rule 23(b)(2) as the plaintiffs proposed.³³ If Wal-Mart's objections are valid, which the Supreme Court will soon determine,³⁴ then the class will be decertified and the plaintiffs will be limited to pursuing separate suits or forming smaller classes.³⁵

B. Rules 23(c) Through (h): How to Administer Class Actions

After a court decides to certify a class, it must announce its decision by order³⁶ and carry out numerous administrative tasks.³⁷ For present purposes, the important tasks are those related to the content of certification orders. According to Rule 23(c)(1)(B), an order "must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g)."³⁸ The first and

²⁹ Fed. R. Civ. P. 23(b)(3).

³⁰ 7AA Charles Alan Wright et al., *Federal Practice and Procedure* § 1775 (3d ed. 2005).

³¹ *Dukes v. Wal-Mart Stores*, 603 F.3d 571, 578 & n.3, 579 (9th Cir. 2010).

³² *Id.* at 579.

³³ *Id.* at 615.

³⁴ *Wal-Mart Stores v. Dukes*, 131 S. Ct. 795 (2010) (granting certiorari to review Wal-Mart's Rule 23 arguments).

³⁵ See 7A Charles Alan Wright et al., *Federal Practice and Procedure* § 1759 (3d ed. 2005) (explaining the typical consequences for plaintiffs of failing to achieve certification).

³⁶ Fed. R. Civ. P. 23(c).

³⁷ See, e.g., Fed. R. Civ. P. 23(e), (g).

³⁸ Fed. R. Civ. P. 23(c)(1)(B).

last requirements are “self-explanatory.”³⁹ The duty to define the class predates the Rule and has long been familiar to judges.⁴⁰ Appointing class counsel entails no more than listing attorneys’ names.⁴¹ The Rule’s mandate to define “claims, issues, or defenses” may appear similarly straightforward, but it in fact “provokes concern” for judges and litigants.⁴²

To return to the *Wal-Mart* example, the district court defined the class claims by noting that the case involved “a claim against Wal-Mart Stores . . . for sex discrimination under Title VII” and by certifying the class “for purposes of liability, injunctive and declaratory relief, punitive damages, and lost pay.”⁴³ Wal-Mart could have disputed whether the district court’s two references—separated by more than forty pages in its opinion—adequately defined class claims as called for by Rule 23(c)(1)(B).⁴⁴ Instead of focusing on the formalities of Rule 23(c), however, Wal-Mart relied on the substance of Rules 23(a) and (b). Both matters are significant, but as the *Wal-Mart* case demonstrates, the propriety of class certification is largely unrelated to the formalities that must appear in the certification order.

II. CURRENT INTERPRETATIONS OF RULE 23(C)(1)(B)

The command to define claims, issues, or defenses begs three primary questions: what are “class claims, issues, or defenses,” how

³⁹ *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 243 F.R.D. 17, 17 (D. Me. 2007), vacated on other grounds, 522 F.3d 6, 29–30 (1st Cir. 2008).

⁴⁰ See 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 4:2 (6th ed. 2010).

⁴¹ See, e.g., *Coleman v. Gen. Motors Acceptance Corp.*, 220 F.R.D. 64, 99–100 (M.D. Tenn. 2004) (noting the requirement and proceeding to name counsel). To select class counsel, the court must apply the analysis set forth in Rule 23(g). See *id.* Rule 23(c)(1)(B) concerns only recitation of the names selected, but the requirement’s placement “is important because it provides the court with an opportunity to set conditions controlling and regulating attorney activities and fee arrangements at the commencement of the class action.” John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 *Miss. C. L. Rev.* 323, 371 (2005).

⁴² *In re New Motor Vehicles*, 243 F.R.D. at 17.

⁴³ *Dukes v. Wal-Mart Stores*, 222 F.R.D. 137, 141, 188 (N.D. Cal. 2004) (internal footnote omitted). In addition, the court expressly excluded two class representatives’ race-discrimination claims. *Id.* at 188.

⁴⁴ Wal-Mart did not make this argument on direct appeal. In seeking Supreme Court review, however, Wal-Mart noted in a single sentence that the district court may have failed to follow Rule 23(c)(1)(B). See *Petition for Writ of Certiorari* 32, *Wal-Mart Stores v. Dukes*, No. 10-277 (U.S. Apr. 25, 2010), cert. granted, 131 S. Ct. 795 (2010).

does one define them, and what happens if the definition is inadequate? This Part surveys judicial responses to those questions, noting analytical holes where appropriate but describing the law as it stands. Most opinions interpreting Rule 23(c)(1)(B) relate to a recent series of Third Circuit cases, but the First Circuit also has offered its own analysis. Other circuits have cited the Rule only in passing or for propositions irrelevant to the present inquiry.⁴⁵ Although few district judges have written extensively about the Rule, their class-certification orders both amplify and deviate from appellate explanations.

A. The Third Circuit's "Full Scope and Parameters" Requirement

In 2006, the Third Circuit became the first appellate court to construe Rule 23(c)(1)(B) and concluded that lower courts "often" fail to follow the Rule's requirement for "full and clear articulation of the litigation's contours at the time of class certification."⁴⁶ As to the subject for definition, the Third Circuit has noted that Rule 23(c)(1)(B) pertains to those "claims, issues, *and* defenses"⁴⁷ to be "treated on a class basis as the matter is litigated."⁴⁸ The court has also signaled that the issues for definition may differ from the issues appropriate for severance under Rule 23(c)(4).⁴⁹

To define claims, issues, and defenses is "[t]o frame or give a precise description" of them,⁵⁰ and the duty "is identical to the re-

⁴⁵ See *Menominee Indian Tribe of Wis. v. United States*, 614 F.3d 519, 527–28 (D.C. Cir. 2010) (discussing the timing of class definition); *Harper v. Sheriff of Cook County*, 581 F.3d 511, 514 (7th Cir. 2009) (addressing a jurisdictional matter concerning class definition); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 37–38 (2d Cir. 2009) (noting the court's authority to define classes); *Romberio v. Unum-provident Corp.*, 385 F. App'x 423, 429 (6th Cir. 2009) (drawing an analogy); *Skinner v. Uphoff*, 175 F. App'x 255, 260 (10th Cir. 2006) (referring to appointment of class counsel).

⁴⁶ *Wachtel v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179, 185–86 (3d Cir. 2006).

⁴⁷ *Id.* at 181 n.1, 185 (emphasis added); see also *Sullivan v. DB Invs.*, 613 F.3d 134, 155–56 (3d Cir. 2010) (requiring definition of "claims and issues"), *en banc* reh'g granted, 619 F.3d 287, 288 (3d Cir. 2010); *In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774, 782 (3d Cir. 2009) (approving an order that outlined claims and defenses); *Nafar v. Hollywood Tanning Sys.*, 339 F. App'x 216, 219 (3d Cir. 2009) (not precedential) (requiring a "list of the claims, issues, and defenses").

⁴⁸ *Wachtel*, 453 F.3d at 185.

⁴⁹ See *id.* at 181 n.1.

⁵⁰ *Id.* at 185 (quoting Oxford English Dictionary (2d ed. 1989)).

quirement to define the ‘class’ itself.”⁵¹ In other words, courts must define claims, issues, and defenses in the “specific” and “deliberate” manner historically associated with class definitions.⁵² While definitions need not appear in any “particular format” or outline claim elements, they should include a “readily discernable, clear, and complete list” of claims, issues, and defenses.⁵³ For a list to be complete, it has to enable appellate courts to discern the “full scope and parameters” of class claims, issues, and defenses without “comb[ing] the entirety” of an opinion or order in search of “isolated statements.”⁵⁴ A list is incomplete if it contains qualifiers such as “inter alia” that signify partial treatment.⁵⁵ Routine certification opinions that merely discuss “the allegations in the complaint, the facts of the case, and some combination of the substantive requirements for class certification” contain no list at all and thus provide no definition.⁵⁶

In the Third Circuit, compiling a deficient list of claims, issues, and defenses constitutes an abuse of discretion.⁵⁷ The Third Circuit has vacated certification orders for that reason alone, allowing plaintiffs to return to district court to propose formalistic amendments that bring the order into conformity with Rule 23(c)(1)(B).⁵⁸ In some cases, however, the Third Circuit has proceeded to address substantive arguments against class certification after determining that an order violated the Rule.⁵⁹ The latter approach lets defendants achieve lasting victory, but litigants have little control over which course the Third Circuit will follow.

The principles set forth by the Third Circuit are simple to restate but difficult to apply with precision. Although the court seemingly forces district judges to compose lists of claims, issues, *and* defenses, precedent offers limited guidance about the necessary con-

⁵¹ *Id.*

⁵² See *id.* at 185, 188 n.10.

⁵³ *Id.* at 187–88 & nn.9–10.

⁵⁴ *Id.* at 185, 189.

⁵⁵ *Id.* at 189.

⁵⁶ See *id.* at 184.

⁵⁷ *Id.* at 184, 189–90; *Sullivan v. DB Invs.*, 613 F.3d 134, 155 (3d Cir. 2010), en banc reh’g granted, 619 F.3d 287, 288 (3d Cir. 2010).

⁵⁸ See *supra* text accompanying notes 6–10.

⁵⁹ See *Sullivan*, 613 F.3d at 154–58; *Nafar v. Hollywood Tanning Sys.*, 339 F. App’x 216, 219–25 (3d Cir. 2009) (not precedential).

tent of such lists. Consequently, the Third Circuit's approach becomes clear only as applied to the facts of its four opinions addressing Rule 23(c)(1)(B).⁶⁰ Behind a shared rhetorical veneer, those cases conflict on fundamental points and leave Third Circuit law deeply unsettled.

1. *Wachtel v. Guardian Life Insurance Co. of America*

In *Wachtel*,⁶¹ the district court certified a class of health-plan beneficiaries to sue their benefits provider for alleged violations of the Employee Retirement Income Security Act ("ERISA").⁶² On appeal, the defendant argued that the district court wrongfully certified the class under Rule 23(b)(3) because class-wide questions did not predominate over litigant-specific ones.⁶³ According to the defendant, the district court neglected to separate "class and non-class issues at the time of class certification,"⁶⁴ and this "failure to apply the methodology of Rule 23(c)[(1)(B) was] fatal to its finding of predominance under Rule 23(b)(3)."⁶⁵ Even though the defendant invoked Rule 23(c)(1)(B) solely to establish one premise in its ultimate argument that Rule 23(b)(3) had been defied, the Third Circuit declined to reach the latter rule. Instead, the court remanded for further definition of class claims, issues, or defenses af-

⁶⁰ Some commentators identify a fifth case, *Beck v. Maximus, Inc.*, 457 F.3d 291 (3d Cir. 2006), as belonging to the *Wachtel* line. See, e.g., 2 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 7:15 (6th ed. 2010). In *Beck*, however, the Third Circuit merely cited *Wachtel* and Rule 23(c)(1)(B) before vacating the certification order because (1) the plaintiff was not an adequate representative and (2) the district court certified the class under all three provisions of Rule 23(b) without "provid[ing] its reasons for doing so." *Beck*, 457 F.3d at 297–301. The *Beck* opinion contains no discussion of how or whether the order under review defined claims, issues, or defenses. In another recent case, the Third Circuit "question[ed] whether the District Court conformed with" *Wachtel* but declined to address the matter because it was not raised on appeal. *In re DVI, Inc. Sec. Litig.*, Nos. 08-8033, 08-8045, 2011 WL 1125926, at *9 n.22 (3d Cir. Mar. 29, 2011).

⁶¹ *Wachtel v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179 (3d Cir. 2006).

⁶² *Id.* at 181–82.

⁶³ Brief of Appellants at 16–17, *Wachtel v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179 (3d Cir. 2006) (Nos. 04-4304, 04-4433 & 04-4434).

⁶⁴ *Id.* at 19 (internal capitalization omitted)

⁶⁵ *Id.* at 16.

ter concluding that the certification order⁶⁶ contained insufficient detail to satisfy Rule 23(c)(1)(B).⁶⁷

The Third Circuit objected specifically to several aspects of the certification order. First, one list of common questions was prefaced by “inter alia,” which suggests an “intentionally incomplete” grouping.⁶⁸ Second, the district court neglected to mention “legal provisions allegedly violated” and alluded to common issues only in “general, non-exclusive statements that fail[ed] to articulate . . . particular claims.”⁶⁹ Additionally, references to claims, issues, and defenses were intermixed with discussions of commonality and predominance—“analysis that [was] distinct from analysis meant to define.”⁷⁰ In sum, the district court’s forty-six-page order and opinion was “unclear, intermittent, and incomplete” with respect to class claims, issues, and defenses.⁷¹ The Third Circuit reached this conclusion even though the order identified the plaintiffs’ four causes of action under ERISA, summarized the plaintiffs’ allegations of fact, and noted the absence of “any unique defenses that will become the focus of the litigation.”⁷²

2. *Nafar v. Hollywood Tanning Systems*

The district court in *Nafar*⁷³ certified a class of tanning-salon patrons seeking damages for alleged common-law fraud, unjust enrichment, breach of warranty, and violation of a state consumer statute.⁷⁴ The defendants appealed to the Third Circuit and argued that, among other errors, the district court failed “to identify the

⁶⁶ The *Wachtel* court uses “order” to mean both an order itself and any incorporated memorandum opinions. *Wachtel*, 453 F.3d at 188. This Note follows that convention while describing Third Circuit law, but the reference in Rule 23(c)(1)(B) to “order[s]” rather than “opinions” casts some light on the Rule’s meaning. See *infra* text accompanying notes 168–170.

⁶⁷ *Wachtel*, 453 F.3d at 181 n.1, 189–90.

⁶⁸ *Id.* at 189.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See *Wachtel v. Guardian Life Ins. Co.*, 223 F.R.D. 196, 198–203, 212, 216–17 (D.N.J. 2004).

⁷³ *Nafar v. Hollywood Tanning Sys.*, 339 F. App’x 216 (3d Cir. 2009) (not precedential).

⁷⁴ *Nafar v. Hollywood Tanning Sys.*, No. 06-CV-3826 (DMC), 2008 U.S. Dist. LEXIS 61439, at *1–2 (D.N.J. Aug. 11, 2008).

class and class claims it purported to certify.”⁷⁵ In vacating the order, however, the Third Circuit demanded far more than identification of certified claims:

Nowhere does the Court expressly . . . list the class claims and issues. In the “commonality” discussion, the Court does state that Nafar has asserted “no less than six common issues of law and fact” and then provides some examples. However, this is not a complete list of the claims and issues. Nor does the Court conclude which issues will apply specifically to the class. It is also true that the Court concludes that Hollywood Tans “has provided a generalized defense . . .” in the “typicality” discussion, but the Court does not discuss what this defense is.⁷⁶

Although *Nafar* is a nonprecedential opinion,⁷⁷ it illustrates the extent of detail that Third Circuit judges perceive as necessary under Rule 23(c)(1)(B) and *Wachtel*. After addressing Rule 23(c)(1)(B), however, the Third Circuit in *Nafar* proceeded to the defendants’ other arguments against certification. Ultimately, the Third Circuit instructed the district court to “define the class and the class claims and issues,” revisit its choice-of-law analysis, reexamine the “predominance” factor of Rule 23(b)(3), and determine whether the plaintiff was an adequate class representative.⁷⁸ Unlike the decision in *Wachtel*—which allowed the district court to recertify the vacated class simply by listing common issues in the new certification order—the decision in *Nafar* effectively doomed the plaintiff’s chances to achieve recertification because it rested on more than Rule 23(c)(1)(B).⁷⁹

⁷⁵ Brief of Appellant at 14, *Nafar v. Hollywood Tanning Sys.*, 339 F. App’x 216 (3d Cir. 2009) (No. 08-3994).

⁷⁶ *Nafar*, 339 F. App’x at 219 (internal citation omitted).

⁷⁷ See 3d Cir. I.O.P. 5.7 (2010), available at http://www.ca3.uscourts.gov/Rules/IOP_2010_final2.pdf; see also *In re Mercedes-Benz Tele Aid Contract Litig.*, 267 F.R.D. 113, 134–35 (D.N.J. 2010) (treating *Nafar* as nonbinding).

⁷⁸ *Nafar*, 339 Fed. App’x at 225.

⁷⁹ See *Nafar v. Hollywood Tanning Sys.*, No. 06-CV-3826 (DMC), 2010 U.S. Dist. LEXIS 65183, at *1 n.1 (D.N.J. June 30, 2010) (noting that the class had not been recertified as of 2010).

3. *In re Constar International, Inc. Securities Litigation*

The Third Circuit's opinion in *Constar*⁸⁰ marked its first affirmation of a certification order challenged under Rule 23(c)(1)(B).⁸¹ In a single paragraph, the court recited key passages from *Wachtel* and then concluded that the *Constar* certification order⁸² was "clearly sufficient" because it "outlined how the plaintiffs' claims under §§ 11 and 15 of the Securities Act [of 1933], and the defendants' affirmative defenses, would proceed on a classwide basis."⁸³ With this terse conclusion, the Third Circuit tacitly approved many of the district-court certification practices rejected in *Wachtel*.

Apart from obvious differences in subject matter, the orders reviewed in *Wachtel* and *Constar* were virtual duplicates in form.⁸⁴ Both orders identified the causes of action asserted in the plaintiffs' complaints, but neither order expressly limited class certification to those claims.⁸⁵ Like the order in *Wachtel*, the order in *Constar* discussed class issues while addressing commonality and predominance—but only in general, non-exclusive examples rather than closed lists.⁸⁶ While both orders included compact definitions of the class, neither contained anything resembling a literal list of claims, issues, and defenses.⁸⁷ An appellate court could not distill any list from either order without "comb[ing] the entirety of its text."⁸⁸ In *Wachtel*, the Third Circuit refused to engage in such

⁸⁰ *In re Constar Int'l, Inc. Sec. Litig.*, 585 F.3d 774 (3d Cir. 2009).

⁸¹ *Id.* at 782.

⁸² Here, as in the Third Circuit's opinion, "order" refers collectively to the order itself, an accompanying opinion, and an incorporated Special Master's report. *Id.*

⁸³ *Id.*

⁸⁴ Compare *Wachtel v. Guardian Life Ins. Co.*, 223 F.R.D. 196 (D.N.J. 2004), with *In re Constar Int'l, Inc. Sec. Litig.*, No. 03-5020, 2008 WL 614551 (E.D. Pa. Mar. 4, 2008), and Report and Proposed Order, Diane M. Welsh, Special Master, *In re Constar*, No. 03-5020 (May 7, 2007) (document no. 166) [hereinafter *Welsh Report*].

⁸⁵ *In re Constar*, 2008 WL 614551, at *1 ("This is an action under Sections 11 and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77k and 77o."); *Wachtel*, 223 F.R.D. at 198 (noting that "[t]he Plaintiffs sue under ERISA § 502(a)(1)(B), § 502(a)(3), § 104(b)(4), and § 102).

⁸⁶ See *Wachtel*, 223 F.R.D. at 199 n.2, 212 n.31 (using the phrases "*inter alia*" and "one example of"); *Welsh Report*, supra note 84, at 7–8, 18–23 (using the phrase "[f]or example" and citing examples of class claims while discussing commonality and predominance).

⁸⁷ See *Wachtel*, 223 F.R.D. at 218–19; *Welsh Report*, supra note 84, at 25–26.

⁸⁸ See *Wachtel v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179, 189 (3d Cir. 2006).

combing;⁸⁹ in *Constar*, it did just that. Considered together, *Wachtel* and *Constar* show that the Third Circuit's superficially consistent approach to Rule 23(c)(1)(B) is capable of yielding different results in nearly identical cases.

4. *Sullivan v. DB Investments*

In its most recent application of *Wachtel*, the Third Circuit in *Sullivan*⁹⁰ reiterated that Rule 23(c)(1)(B) mandates "greater detail" than class-certification orders typically contain.⁹¹ Although the *Sullivan* opinion was vacated and will be reheard en banc concerning antitrust matters,⁹² it demonstrates the Third Circuit's continued conflation of claims, issues, and defenses. The district court in *Sullivan* identified "five legal issues supposedly common to the class" and "recognized that the [plaintiffs] were advancing state antitrust, consumer protection, and unjust enrichment claims, and that variations exist between the antitrust and consumer protection laws of different states."⁹³ Additionally, the lead plaintiff's complaint specified the seventy-three state statutory and constitutional provisions allegedly supporting the class claims.⁹⁴ The Third Circuit nonetheless decided that the district court abused its discretion by failing to define class "claims and issues."⁹⁵

To comply with *Wachtel*, the class-certification order should have "identified pertinent state antitrust or consumer protection statutes, explained the relevant state common law of unjust enrichment, [and] described how those statutes and the common law

⁸⁹ *Id.*

⁹⁰ *Sullivan v. DB Invs.*, 613 F.3d 134 (3d Cir. 2010), en banc reh'g granted, 619 F.3d 287, 288 (3d Cir. 2010).

⁹¹ See *id.* at 154; see also *Wachtel*, 453 F.3d at 184 ("Current practice often falls short of [the Third Circuit's] standard.").

⁹² 619 F.3d at 288 (granting rehearing); Order, *Sullivan v. DB Invs.*, No. 08-2785 (3d Cir. Nov. 10, 2010) (document no. 003110344491) (instructing parties to file supplemental briefs answering detailed questions unrelated to Rule 23(c)(1)(B)); Petition of Appellees Shawn Sullivan, Arrigotti Fine Jewelry and James Walnum for Rehearing or Rehearing *En Banc* at 1–4, *Sullivan v. DB Investments*, No. 08-2785 (3d Cir. July 27, 2010) (document no. 003110231348) (asserting no arguments concerning Rule 23(c)(1)(B) as grounds for rehearing).

⁹³ *Sullivan*, 613 F.3d at 155 (internal quotation marks omitted).

⁹⁴ Complaint and Jury Demand at 12–14, *Sullivan v. DB Invs.*, No. 04-2819 SRC (D.N.J. June 14, 2004), 2004 WL 2558822.

⁹⁵ *Sullivan*, 613 F.3d at 155–56.

affect class-wide rights.”⁹⁶ To fix these defects, the Third Circuit suggested an “enumerated list” that would “identify class issues and explicitly state whether those issues apply to [all] . . . or to some combination of the [plaintiffs’ claims].”⁹⁷ Like *Nafar* and unlike *Wachtel*, however, *Sullivan* advanced past flaws in the certification order and addressed the merits of class certification under Rule 23(b).⁹⁸

B. The First Circuit’s “Detail” Standard

According to the First Circuit’s lengthy dicta in *In re Pharmaceutical Industry Average Wholesale Price Litigation*, Rule 23(c)(1)(B) requires class-certification orders to “clarify and detail the identity of a class and the class claims, issues, or defenses.”⁹⁹ The First Circuit treats the phrase “class claims, issues, or defenses”—the subject for definition—as synonymous with “the case’s issues and claims.”¹⁰⁰ To define that subject, district courts must provide “sufficient detail” to help “appellate courts, attorneys, and parties all proceed with more information and mutual understanding.”¹⁰¹ If litigants are concerned that a certification order contains inadequate detail, however, they need to raise the point with the district court before seeking relief from the First Circuit, which will refuse to entertain Rule 23(c)(1)(B) challenges until the district court has denied a motion to refine its order.¹⁰²

The First Circuit’s “detail” standard echoes the instruction in *Wachtel* for district courts to articulate the “contours” of class claims and issues, and *Pharmaceutical Industry* draws liberally from the textual and policy analyses in *Wachtel*.¹⁰³ The First and Third

⁹⁶ Id. at 155.

⁹⁷ Id.

⁹⁸ See id. at 145–54, 156–58.

⁹⁹ 588 F.3d 24, 39 (1st Cir. 2009). The passage is dicta because the appellant waived her Rule 23(c)(1)(B) argument by presenting it “for the first time on appeal.” Id. at 38. “Nevertheless, [the First Circuit] address[ed] this issue in order to provide guidance to courts interpreting and applying this rule.” Id.

¹⁰⁰ Id. at 39.

¹⁰¹ Id. at 40.

¹⁰² See id. at 38 (“[Plaintiff] objects to the court’s certification order under Rule 23(c)(1)(B). She presents this argument for the first time on appeal, and it is therefore waived.”).

¹⁰³ Compare id. at 39–40 (citing and following the Third Circuit’s views about the text and purposes of Rule 23(c)(1)(B)), with *Wachtel v. Guardian Life Ins. Co. of*

Circuits agree that Rule 23(c)(1)(B) calls for district courts to describe issues destined for class-wide resolution, but they diverge on how courts may do so. The Third Circuit insists upon a “complete list” and refuses to “comb” through district-court opinions in search of one.¹⁰⁴ By contrast, the word “list” appears nowhere in *Pharmaceutical Industry*, and the First Circuit praised an order that “devoted many pages to the class’s factual allegations,” “explain[ed] the issues common to the class,” and “discussed the state consumer protection statutes underlying the class’s claim, noting differences among them.”¹⁰⁵ In sum, the First Circuit examined the sufficiency of detail in the opinion without asking—as in *Wachtel*—whether the details were compressed into a closed, easy-to-find list. While the Third Circuit assumes that traditional class-certification opinions usually fail the demands of Rule 23(c)(1)(B),¹⁰⁶ the First Circuit effectively treats such opinions as satisfying the Rule.

C. District Court Developments

Most district courts have not engaged in independent exegesis of Rule 23(c)(1)(B), but class-certification orders fit into three general patterns that illustrate how the Rule applies in practice. Within the Third Circuit and among courts elsewhere that have elected to follow its lead, *Wachtel* provides a rhetorical hinge, but actual compliance with its requirements varies widely. A second approach, unrelated to *Wachtel*, is to briefly define claims by citing causes of action or referring to the plaintiffs’ complaint. Finally, some district courts appear to ignore Rule 23(c)(1)(B) and make no attempt to define claims, issues, or defenses in their class-certification orders.

1. Applying the Third Circuit Rule

Among district courts in the Third Circuit, some conform to the letter of *Wachtel* by composing stand-alone, complete lists of

Am., 453 F.3d 179, 185–86 (3d Cir. 2006) (setting forth the textual and policy analyses that the First Circuit later cited with approval).

¹⁰⁴ *Wachtel*, 453 F.3d at 189.

¹⁰⁵ *In re Pharm. Indus.*, 588 F.3d at 40.

¹⁰⁶ *Wachtel*, 453 F.3d at 184–85.

claims, issues, and defenses for class-wide litigation.¹⁰⁷ Other courts follow the spirit of *Wachtel* by listing claims and issues while ignoring defenses,¹⁰⁸ but some courts omit even issues.¹⁰⁹ In direct contradiction to *Wachtel*, district courts occasionally preface lists with open-ended qualifiers¹¹⁰ or supply no lists at all while scattering references to claims, issues, and defenses throughout their certification opinions.¹¹¹

In addition to applying *Wachtel*, district courts have answered two questions left open by the Third Circuit: what constitutes a “complete list,” and who bears the burden of supplying it? On the first point, one judge reasons that certification orders must be detailed enough to “clarify the issues to be addressed at trial” but need not discuss picayune matters “such as whether a particular newspaper article will be admissible.”¹¹² Another recent opinion distills *Wachtel* into a three-factor test requiring a statement that “(1) mentions the legal provisions allegedly violated by Defendant, (2) is made in a separate portion of the opinion/order wherein the Court specifically defines class claims, issues, or defenses . . . , and (3) states with precision which claims will be litigated on a class basis moving forward.”¹¹³

¹⁰⁷ See, e.g., *In re Pressure Sensitive Lablestock Antitrust Litig.*, No. 3:03-MDL-1556, 2007 WL 4150666, at *23–24 (M.D. Pa. Nov. 19, 2007); *First State Orthopaedics v. Concentra, Inc.*, 534 F. Supp. 2d 500, 515 n.19 (E.D. Pa. 2007); *Grider v. Keystone Health Plan Cent.*, No. 2001-CV-05641, 2006 WL 3825178, at *1–2 (E.D. Pa. Dec. 20, 2006); *Zeno v. Ford Motor Co.*, 238 F.R.D. 173, 198 (W.D. Pa. 2006).

¹⁰⁸ See, e.g., *Teva Pharm. USA v. Abbott Labs.*, 252 F.R.D. 213, 232 (D. Del. 2008); *Dittimus-Bey v. Taylor*, 244 F.R.D. 284, 294 & n.8 (D.N.J. 2007); *Barr v. Harrah’s Entm’t*, 242 F.R.D. 287, 289 (D.N.J. 2007).

¹⁰⁹ See, e.g., *M.A. ex rel. E.S. v. Newark Pub. Sch.*, No. 01-3389 (SRC), 2009 WL 4799291, at *18 (D.N.J. Dec. 7, 2009); *Hohider v. United Parcel Serv.*, 243 F.R.D. 147, 245–46 (W.D. Pa. 2007), vacated on other grounds, 574 F.3d 169, 171 (3d Cir. 2009).

¹¹⁰ See, e.g., *Cohen v. Chi. Title Ins. Co.*, 242 F.R.D. 295, 302 (E.D. Pa. 2007) (using the qualifier “include”); *In re Elec. Carbon Prods. Antitrust Litig.*, 447 F. Supp. 2d 389, 395 n.10 (D.N.J. 2006) (same).

¹¹¹ See, e.g., *Alberton v. Commonwealth Land Title Ins. Co.*, 247 F.R.D. 469, 476, 479–83 (E.D. Pa. 2008); *In re Plastics Additives Antitrust Litig.*, No. 03-CV-2038, 2006 WL 6172033, at *2 (E.D. Pa. Dec. 20, 2006); see also *Jenkins v. Hyundai Motor Fin. Co.*, No. C2-04-720, 2008 WL 2268319, at *3–4 (S.D. Ohio June 2, 2008) (concluding that an order discussing issues “throughout the text” would satisfy *Wachtel*).

¹¹² *Alberton v. Commonwealth Land Title Ins. Co.*, No. 06-3755, 2008 WL 2945391, at *3–4 (E.D. Pa. July 29, 2008).

¹¹³ *Pro v. Hertz Equip. Rental Corp.*, No. 06-CV-3830 (DMC), 2010 WL 1382230, at *4 (D.N.J. Apr. 5, 2010).

The question of who must list claims, issues, and defenses has led to one particularly expansive reading of *Wachtel*. Three judges have concluded that Rule 23(c)(1)(B), as interpreted by the Third Circuit, modifies the test for class certification by imposing a new, preliminary burden on plaintiffs to “provide the Court with adequate information so that it can enter an Order defining the class and listing the claims, issues, or defenses subject to class treatment.”¹¹⁴ Under that approach, Rule 23(c)(1)(B) is elevated to a status alongside the fundamental certification prerequisites set out by Rules 23(a) and (b).¹¹⁵ At least one judge adhering to *Wachtel* has assigned the definitional burden to himself, however, because plaintiffs would face a “well-nigh impossible” mission if forced to recognize all relevant issues before the court decides how narrow or expansive the class will be.¹¹⁶

2. Citing Complaints, Statutes, or Causes of Action

Rather than attempting to forecast and list all issues likely to arise in litigation, many district courts outside the Third Circuit satisfy Rule 23(c)(1)(B) by identifying class claims in short form. To indicate which claims an order certifies, several district courts have simply cited the statutory¹¹⁷ or common-law causes of action asserted by the plaintiffs.¹¹⁸ District courts also define claims by incorporating all those named in the complaint¹¹⁹ or by citing particu-

¹¹⁴ *Bennett v. Corr. Med. Servs.*, No. 02-4993 (NLH), 2008 WL 2064202, at *11, 16 (D.N.J. May 14, 2008); accord *A.L. v. Value Behavioral Health*, No. 09-113, 2010 WL 936112, at *7 (W.D. Pa. Feb. 24, 2010); *Rowe v. E.I. DuPont de Nemours & Co.*, Nos. 06-1810 (RMB), 06-3080 (RMB), 2008 WL 5412912, at *23 (D.N.J. Dec. 23, 2008).

¹¹⁵ See *Bennett*, 2008 WL 2064202, at *11 (calling Rules 23(a), (b), and (c)(1)(B) the “legal requisites for class certification”).

¹¹⁶ *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 243 F.R.D. 17, 18 (D. Me. 2007), vacated on other grounds, 522 F.3d 6, 29–30 (1st Cir. 2008).

¹¹⁷ See, e.g., *Bouaphakeo v. Tyson Foods*, 564 F. Supp. 2d 870, 909–10 (N.D. Iowa 2008); *Drinkman v. Encore Receivable Mgmt.*, No. 07-C-363-S, 2007 WL 4458307, at *6 (W.D. Wis. Dec. 7, 2007); *Newton-Nations v. Rogers*, 221 F.R.D. 509, 512–13 (D. Ariz. 2004).

¹¹⁸ See, e.g., *Hamilton v. First Am. Title Ins. Co.*, 266 F.R.D. 153, 172 (N.D. Tex. 2010) (noting common law claims and a statutory claim); *Boynton v. Headwaters, Inc.*, 252 F.R.D. 397, 407 (W.D. Tenn. 2008).

¹¹⁹ See, e.g., *Brunson v. Louisiana-Pac. Corp.*, 266 F.R.D. 112, 121 (D.S.C. 2010); *Riker v. Gibbons*, No. 3:08-CV-00115-LRH-RAM, 2009 WL 910971, at *7 (D. Nev. Mar. 31, 2009); *Wong v. PartyGaming*, No. 1:06-CV-02376, 2007 WL 851879, at *3–4 (N.D. Ohio Mar. 19, 2007); *Xiufang Situ v. Leavitt*, 240 F.R.D. 551, 564 (N.D. Cal.

lar counts.¹²⁰ No district court employing these abbreviations has explained its reasons for doing so,¹²¹ but this Note argues below that such references are precisely what Rule 23(c)(1)(B) demands of most class-certification orders.¹²²

Because *Wachtel* compels discussion of claims, issues, and defenses in a manner that describes the “full scope and parameters” of the litigation,¹²³ district courts that merely incorporate complaints or cite statutes do not adhere to the Third Circuit approach. Nonetheless, even two district courts within the Third Circuit have attempted to satisfy Rule 23(c)(1)(B) by adopting class claims as defined in plaintiffs’ complaints.¹²⁴

3. Neglecting to Identify Class Claims

Rule 23(c)(1)(B) states neither a wish nor an option; it “govern[s]” civil actions in federal courts.¹²⁵ Despite the Rule’s command to “define . . . class claims, issues, or defenses,”¹²⁶ however, many district courts have not done so when issuing class-certification orders. One common practice is to define the class and name class counsel—and even to mention Rule 23(c)(1)(B)—while skipping past the Rule’s requirement for claim definition.¹²⁷ No

2007); *Arnold v. Ariz. Dep’t of Pub. Safety*, No. CV-01-1463-PHX-LOA, 2006 WL 2168637, at *4 (D. Ariz. July 31, 2006).

¹²⁰ See, e.g., *In re Am. Int’l Group., Inc. Sec. Litig.*, 265 F.R.D. 157, 189 (S.D.N.Y. 2010) (referring to counts excluded from certification); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 556 F. Supp. 2d 941, 962 (W.D. Wis. 2008); *In re Enron Corp. Sec., Derivative & “ERISA” Litig.*, No. MDL 1446, 2006 WL 1662596, at *19 (S.D. Tex. June 7, 2006).

¹²¹ One opinion employed a slightly extended reference to the plaintiffs’ Fourteenth Amendment claim and declined to include additional sub-issues in the claim definition. *Flood v. Dominguez*, No. 2:08-CV-153, 2011 WL 238265, at *1–2 (N.D. Ind. Jan. 21, 2011). The court reasoned that subissues “are not separate claims” and indicated that the requisite degree of specificity is particularly low when plaintiffs assert only a single claim. See *id.* at *2 & n.2.

¹²² See *infra* Subsection III.A.2.

¹²³ *Wachtel v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179, 185 (3d Cir. 2006).

¹²⁴ *Sessions v. Owens-Illinois, Inc.*, 267 F.R.D. 171, 180 (M.D. Pa. 2010); *Stanford v. Foamex L.P.*, 263 F.R.D. 156, 175 (E.D. Pa. 2009).

¹²⁵ Fed. R. Civ. P. 1; see also *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988) (“[F]ederal courts have no more discretion to disregard the [Federal Rules] . . . than they do to disregard constitutional or statutory provisions.”).

¹²⁶ Fed. R. Civ. P. 23(c)(1)(B).

¹²⁷ See, e.g., *Lewis v. First Am. Title Ins. Co.*, 265 F.R.D. 536, 547–48 (D. Idaho 2010); *Kaufman v. Am. Express Travel Related Servs. Co.*, 264 F.R.D. 438, 445, 450

empirical study has yet quantified courts' fidelity to Rule 23(c)(1)(B), but statistics about a related rule are telling. According to Rule 23(c)(2)(B), certain notices to class members need to "clearly and concisely state . . . the class claims, issues, or defenses," but nearly one in four notices include no such statement.¹²⁸ Whatever else it might mean, the judicial inattention to "claims, issues, or defenses" reveals that the Third Circuit's expansive reading of Rule 23(c)(1)(B) is far afield from actual district-court practices.

III. AN ALTERNATIVE INTERPRETATION OF RULE 23(C)(1)(B)

What are "class claims, issues, or defenses," and how does one "define" them? Courts have confused the second question by failing to appreciate the first one. The phrase "claims, issues, or defenses" is the key that unlocks Rule 23(c)(1)(B). It reflects that Rule 23 permits three flavors of class actions. Most often, plaintiffs sue as class representatives to pursue entire *claims*.¹²⁹ In rare cases, plaintiff classes instead use Rule 23(c)(4) to litigate only particular *issues*.¹³⁰ Occasionally, a few defendants are sued as representatives of a larger class asserting common *defenses* to charges of collective wrongdoing.¹³¹ The instruction to define "claims, issues, or defenses" thus conditions the subject for definition on the type of class certified. In this context, definition necessitates no more than

(N.D. Ill. 2009); *Traylor v. Avnet, Inc.*, 257 F.R.D. 521, 529 (D. Ariz. 2009); *Smith v. Dearborn County*, 244 F.R.D. 512, 520 (S.D. Ind. 2007).

¹²⁸ Fed. R. Civ. P. 23(c)(2)(B); Emory G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., *Impact of the Class Action Fairness Act on the Federal Courts 13* (2008), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/PreliminaryFindingsFromPhaseTwoClassActionFairnessStudy\(2008\).pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/PreliminaryFindingsFromPhaseTwoClassActionFairnessStudy(2008).pdf).

¹²⁹ See Willging et al., *supra* note 27, at 118, 121 (reporting that seventy-nine percent of certification motions involve "plaintiffs . . . seeking to certify a [non-issue-specific] plaintiff class").

¹³⁰ One study revealed that among the 152 class actions closed over a two-year span in four federal district courts, there was not a single Rule 23(c)(4) class. *Id.* at 82, 120–23. As a general matter, "few issue classes have been upheld in the last several years." 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, 280.

¹³¹ Over two years in four federal district courts, litigants filed only four motions seeking the certification of a mandatory-defendant class, Willging et al., *supra* note 27, at 120, and Judge Posner recently confirmed that defendant classes "are rare birds." *CIGNA Healthcare of St. Louis v. Kaiser*, 294 F.3d 849, 853 (7th Cir. 2002).

partitioning—a statement of which claims (or issues or defenses) are certified and which, by implication, are not. Although no court has fully articulated this conclusion,¹³² it follows from the Rule’s text, history, and purposes.

A. Textual Evidence

Recall the language of Rule 23(c)(1)(B): “An order that certifies a class action must define the class *and* the *class* claims, issues, *or* defenses”¹³³ Grammar alone indicates that an order has to define X and Y(a), Y(b), or Y(c). The conjunctive “and” establishes that two definitions are required. The disjunctive “or” signifies that the second definition only needs to encompass one of Y(a), Y(b), or Y(c) because each of the three options is “independently sufficient.”¹³⁴ Y stands for “class,” an adjective that modifies each word in the series it precedes.¹³⁵ Plugging the text of Rule 23(c)(1)(B) into these placeholders shows that class-certification orders have to

¹³² The Seventh Circuit and at least one treatise writer have noted in passing that the “issues” mentioned in Rule 23(c)(1)(B) are linked to the “issues” discussed in Rule 23(c)(4). See *Arreola v. Godinez*, 546 F.3d 788, 800 (7th Cir. 2008) (“Rule 23(c)(1)(B) specifically recognizes the possibility of certifying not just ‘class claims,’ but also class ‘issues.’”); John F.X. Peloso et al., 2 *Business and Commercial Litigation in Federal Courts* § 16:49 (Robert L. Haig ed., 2d ed. 2005). Chief Judge Simon of the Northern District of Indiana has come closest to endorsing this Note’s conclusion. In a recent prisoner class action, he defined the plaintiffs’ claim as “[an allegation] that the conditions of confinement in the Lake County holding cells violate the Fourteenth Amendment for inmates held in excess of 24 hours.” *Flood v. Dominguez*, No. 2:08-CV-153, 2011 WL 238265, at *2 (N.D. Ind. Jan. 21, 2011). When the defendants, citing *Wachtel*, argued that Rule 23(c)(1)(B) required more specificity, Judge Simon replied that the “issues” behind the prisoners’ allegation—“no bedding, cold temperatures, lack of hygiene, lack of exercise, small meal portions—are not separate claims.” *Id.* at *1–2. However, his conclusion was primarily based on the prisoners’ assertion of a single claim; he distinguished *Wachtel*’s call for additional specificity as applying to multiple-claim cases. See *id.* at *2 & n.2.

¹³³ Fed. R. Civ. P. 23(c)(1)(B) (emphasis added).

¹³⁴ *Horne v. Flores*, 129 S. Ct. 2579, 2597 (2009) (construing “or” in Rule 60(b)(5)); accord *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). But see *De Sylva v. Ballentine*, 351 U.S. 570, 573 (1956) (“[T]he word ‘or’ is often used as a careless substitute for the word ‘and’ . . . in phrases where ‘and’ would express the thought with greater clarity.”).

¹³⁵ See *Wash. Educ. Ass’n v. Nat’l Right to Work Legal Def. Found.*, 187 F. App’x 681, 682 (9th Cir. 2006) (“Under generally accepted rules of syntax, an initial modifier will tend to govern all elements in the series”) (internal quotation marks omitted); *Ryder v. USAA Gen. Indem. Co.*, 938 A.2d 4, 8 (Me. 2007).

(1) define the class and (2) define the class claims, or the class issues, or the class defenses.

1. “Class claims, issues, or defenses”

In isolation, acknowledging that “claims, issues, or defenses” is a disjunctive grouping does not explain Rule 23(c)(1)(B). Once it becomes clear that courts must define the class claims, the class issues, or the class defenses, attention turns to the meaning of each category and how courts should select one or more to define. All three words have common legal meanings, and every lawsuit includes—in the broadest sense—someone’s claims, someone’s defenses, and some issues.¹³⁶ If Rule 23(c)(1)(B) speaks to claims, issues, or defenses in that sense and treats them as independently sufficient, however, it invites an irrational choice about which category to define. A rule that truly compelled courts to expound on details would not empower them to select just claims, just issues, or just defenses for definition.

Consider, for example, the facts of *The T.J. Hooper*, a well-known admiralty case.¹³⁷ The claims alleged negligent towing and breach of contract, the defenses involved liability limits and denial of fault, and the issues included industry standards of care, weather conditions, and the seaworthiness of the ruined vessels.¹³⁸ If this case were litigated as a modern class action,¹³⁹ and if Rule 23(c)(1)(B) referred to “claims, issues, or defenses” disjunctively and in the everyday sense, then a certification order could define the tower’s two defenses (or the multiplicity of subissues) while ignoring other aspects of the case, including the plaintiffs’ causes of action. A court’s choice to proceed in that manner would be arbitrary and inane but still textually permissible.

¹³⁶ A claim is “[t]he aggregate of operative facts giving rise to a right enforceable by a court,” an issue is a “point in dispute between two or more parties,” and a defense is a “defendant’s stated reason why the plaintiff . . . has no valid case.” Black’s Law Dictionary 264, 849, 451 (8th ed. 2004).

¹³⁷ 53 F.2d 107 (S.D.N.Y. 1931), aff’d, 60 F.2d 737 (2d Cir. 1932).

¹³⁸ Id. at 108–09, 111; see also *The T.J. Hooper*, 60 F.2d 737, 737 (2d Cir. 1932) (noting the suit’s basis in contracts of carriage and towage).

¹³⁹ This illustration ignores certain facts of the actual case and the potential obstacles to certifying contract and admiralty claims for class-action treatment.

Just as the phrase “I have a foreign object in my eye” linguistically could—but logically should not—be read to mean “something from Italy,”¹⁴⁰ Rule 23(c)(1)(B) should not be treated as establishing a grab bag of subjects from which judges may randomly select one to define. Although slicing “claims, issues, or defenses” into its component nouns and then consulting a dictionary would support the grab-bag approach, “[w]ords, like syllables, acquire meaning not in isolation but within their context.”¹⁴¹ Rule 23 abounds with language contextualizing “claims, issues, or defenses.” First, notice to class members “must clearly and concisely state . . . the class claims, issues, or defenses.”¹⁴² Second, the “claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court’s approval.”¹⁴³ This repeat use indicates that “claims, issues, or defenses” is a general abbreviation within Rule 23 rather than a term specific to Rule 23(c)(1)(B) or a recurring string of unrelated words.¹⁴⁴

Other pieces of Rule 23 aid in unraveling the abbreviation. The first line of Rule 23 authorizes the creation of plaintiff or defendant classes by stating that “members of a class may *sue or be sued* as representative parties.”¹⁴⁵ A similar plaintiff-defendant bifurcation is evident in the requirement that the representatives’ “claims or defenses” be typical of the class and in the provision authorizing notice to class members of their rights to “intervene and present claims or defenses.”¹⁴⁶ Taken together, those sections show that “claims” are what parties assert when suing as representative plaintiffs, and “defenses” are what parties offer when being sued as rep-

¹⁴⁰ *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 319 (1988) (Scalia, J., concurring in part and dissenting in part).

¹⁴¹ *Id.*

¹⁴² Fed. R. Civ. P. 23(c)(2)(B).

¹⁴³ Fed. R. Civ. P. 23(e).

¹⁴⁴ See *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) (noting the “normal rule of statutory interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning”); 2A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 46:5 (7th ed. 2007) (“It is always unsafe to construe a statute or contract by a process of etymological dissection, and to separate words and then apply to each, thus separated from its context, some particular definition given by lexicographers, and then to reconstruct the instrument upon the basis of these definitions.”).

¹⁴⁵ Fed. R. Civ. P. 23(a) (emphasis added).

¹⁴⁶ Fed. R. Civ. P. 23(a)(3), (d)(1)(B)(iii).

representative defendants. Unless “class . . . defenses”¹⁴⁷ alludes to mandatory-defendant classes, the expression would be largely nonsensical; plaintiff classes do not have defenses except in a peculiar counterclaim scenario that typically arises only in state-court consumer litigation.¹⁴⁸ If “claims” and “defenses” are thus understood, only the meaning of class “issues” remains in doubt. Rule 23(c)(4) supplies the answer: it allows an action to “be brought or maintained as a class action with respect to particular issues.”¹⁴⁹

In short, Rule 23 uses the phrase “claims, issues, or defenses” to indicate “claims of representative plaintiffs, issues in classes certified with respect to particular issues, or defenses of representative defendants.” The shortened phrase appears wherever saying just “claims” might imply that defendant classes or issue classes need not comply with a provision of Rule 23. As used in Rule 23(c)(1)(B), the phrase signifies that the mandatory content of certification orders depends on the type of class certified. For a typical plaintiff class, a court may define claims without addressing issues and defenses. If a court certifies a class under Rule 23(c)(4) or as a mandatory-defendant class, the obligation to define does not disappear; it shifts to issues or defenses. Only if a court certifies some complete claims and some particular issues in the same action must it define both in the certification order. Rule 23(c)(1)(B) and its disjunctive “or” recognize the option to choose more than one item from the menu of “claims, issues, or defenses,” but the Rule’s text does not compel such a choice.¹⁵⁰

¹⁴⁷ Fed. R. Civ. P. 23(c)(1)(B).

¹⁴⁸ These cases begin with a creditor’s suit against a single borrower and become class actions when the defendant-borrower counterclaims against the creditor on behalf of other consumers. See Jay Tidmarsh, Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action, 35 W. St. U. L. Rev. 193, 196–97, 206 (2007) (describing such cases and concluding that they generally cannot be removed to federal court); see, e.g., *Ayyad v. Sprint Spectrum*, No. 03-121510, 2008 WL 5467255 (Cal. Super. Ct. Dec. 24, 2008). At that point, the consumers assume a plaintiff posture for purposes of the counterclaim class action, but at least some class members also may be asserting defenses to the creditor’s original claims. The terminological twists required to imagine a “class . . . defense” outside the mandatory-defendant context should provide ample assurance that the phrase was not designed with these scenarios in mind.

¹⁴⁹ Fed. R. Civ. P. 23(c)(4).

¹⁵⁰ Considerations external to Rule 23(c)(1)(B) may require the court to certify claims and particular issues in the same suit. For instance, Rule 23(c)(4) “imposes a duty on the court to insure that only those questions which are appropriate for class

2. *The Meaning of “Define”*

Even though certification orders need only define—depending on the class type—claims, or issues, or defenses, questions linger about the scope of definition. Defining “define” is an abstract and circular chore but not a new one. In a broad sense, definition involves detailing “the essential constituents of a term, whereby to furnish an adequate explanation of its significance.”¹⁵¹ More narrowly, to define a concept is to “mark the limits and fix the meaning thereof” by excluding all that is dissimilar and including all that is alike.¹⁵² As Justice Story wrote in 1820, “To define piracies . . . is merely to enumerate the crimes which shall constitute piracy; and this may be done either by a reference to crimes having a technical name, and determinate extent, or by enumerating the acts in detail.”¹⁵³ The same could be said of defining “claims, issues, or defenses” today. To understand the minimum duties imposed by Rule 23(c)(1)(B), however, judges need to decide which connotation of “define” the Rule imparts. Since “‘definition’ is in itself difficult to define,” its meaning ultimately should be determined from textual clues.¹⁵⁴ The Federal Rules offer little guidance because the verb “define” appears nowhere outside Rule 23(c)(1)(B).¹⁵⁵ None-

adjudication be certified.” *Chiang v. Veneman*, 385 F.3d 256, 267 (3d Cir. 2004). These considerations implicate a debate about Rule 23(c)(4) that is beyond the scope of this Note. Compare Romberg, *supra* note 130, at 334 (praising Rule 23(c)(4)(A) as “a finely calibrated tool” that enables courts to “slice” certain cases “into their constituent issues”), with Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 *Emory L.J.* 709, 711, 763 (2003) (condemning attempts “to invoke (c)(4)(A) as an end-run around other Rule 23 requirements” and noting that the “fairly minor” reference to “issues” in Rule 23(c)(1)(B) “can hardly support an expansive interpretation of . . . Rule 23(c)(4)(A)”).

¹⁵¹ *Hoff v. State*, 197 A. 75, 80 (Del. Super. Ct. 1938); accord *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 39 (1st Cir. 2009) (discussing definition of Rule 23(c)(1)(B)).

¹⁵² *State v. Gardner*, 92 So. 368, 370 (La. 1922); accord *City of Aurora v. PS Sys.*, No. 07-CV-02371-PAB-BNB, 2010 U.S. Dist. LEXIS 61935, at *24 (D. Colo. June 2, 2010); *Dallas Symphony Ass’n v. Dallas County Appraisal Dist.*, 695 S.W.2d 595, 598 (Tex. App. 1985).

¹⁵³ *United States v. Smith*, 18 U.S. (5 Wheat) 153, 160 (1820) (Story, J.).

¹⁵⁴ *School Dist. No. 20 v. Bryan*, 99 P. 28, 29 (Wash. 1909).

¹⁵⁵ Searches of the Federal Rules of Appellate Procedure, Bankruptcy, Criminal Procedure, and Evidence likewise yield no provisions in which “define” is used as an imperative verb. Instead, “defined” and “definition” appear only as section headers, see, e.g., Fed. R. Crim. P. 1(b), or in the phrase “as defined.” See, e.g., Fed. R. App. P. 10(d).

theless, the Rule's structure suggests that the narrower meaning of "define" should prevail.

In Rule 23(c)(1)(B), "define" is an imperative verb associated with two direct objects, "the class" and "the class claims, issues, or defenses." Whatever "define" means for one object it means for the other; the commands are "identical," as noted in *Wachtel*.¹⁵⁶ Because the traditional role of class definition is to state who is in the class and who is out,¹⁵⁷ the role of claim definition must be to state what is in and what is out. *Wachtel* carries this logic one step too far, however, by reasoning that claim definitions will resemble the "concise paragraph[s]" that define classes.¹⁵⁸

Lengthy verbal formulations are needed to demarcate classes since a class congeals into a discernable group only after suffering a common injury. It is impossible to define a class by resorting to stock phrases because the class never existed before. There is no abbreviation that means "individuals who applied for and were not granted admission to the College of Literature, Science & the Arts of the University of Michigan for all academic years from 1995 forward and who are members of those racial or ethnic groups, including Caucasian, that defendants treated less favorably on the basis of race in considering their application for admission."¹⁵⁹ Without statements of this nature, there is no way to state who fits within a class and who falls outside of it.

Conversely, elaboration is unnecessary to delimit claims. In many cases, *all* claims asserted by the plaintiffs will be litigated class-wide, and the order can plainly say so without repeating what the claims allege. Occasionally, it may be important to itemize claims if some were dismissed, withdrawn, or set aside for resolution in individual suits.¹⁶⁰ Even in those cases, however, courts can

¹⁵⁶ *Wachtel v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179, 185 (3d Cir. 2006).

¹⁵⁷ 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 4:2 (6th ed. 2010).

¹⁵⁸ See *Wachtel*, 453 F.3d at 188 n.10.

¹⁵⁹ *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 814 n.2 (E.D. Mich. 2000). This was the class certified by the district court in the case that gave rise to the Supreme Court's affirmative-action decision in *Gratz v. Bollinger*, 539 U.S. 244 (2003).

¹⁶⁰ See, e.g., *Harrington v. City of Albuquerque*, 222 F.R.D. 505, 518–19 (D.N.M. 2004) (defining class claims by noting that two claims were dismissed and reciting the remaining four claims identified in the plaintiffs' complaint). Additionally, Rule 23(c)(4) allows courts to certify particular causes of action for class treatment while leaving others for individual resolution. *Gunnells v. Healthplan Servs.*, 348 F.3d 417, 441–42 (4th Cir. 2003).

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identify which claims are certified for class treatment by citing statutory provisions, common-law causes of action, or counts from the plaintiffs' complaint. Reciting the questions of law and fact that underlie each claim constitutes issue definition, which is not required unless the judge elects to create issue classes using Rule 23(c)(4).

In the racial-discrimination example above, the claims arose from alleged violations of the Equal Protection Clause and three civil-rights statutes.¹⁶¹ Defining those claims necessitates only constitutional and statutory citations, which explain all that needs to be explained: these causes of action are certified, and all others are excluded by implication. The flesh on the claims can be discerned from the plaintiffs' "statement of [a] claim showing that the pleader is entitled to relief," which has to exist in the record if the case advanced beyond the pleading stage.¹⁶² Replicating those details in the certification order would be a pointless formality.

Courts also may define claims by using labels derived from the complaint. A mention of "Count I" or "plaintiffs' negligence claim" would supply an adequate claim definition. When federal rule-makers desire to prohibit judges from incorporating complaints into orders, they announce an unambiguous ban. Rule 65(d)(1)(C) states that injunctive and restraining orders must "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required."¹⁶³ The absence of comparable language in Rule 23(c)(1)(B) indicates that referring to complaints is a legitimate way to define claims, issues, or defenses in class-certification orders.¹⁶⁴

¹⁶¹ See *Gratz*, 122 F. Supp. 2d at 816.

¹⁶² See Fed. R. Civ. P. 8(a)(2).

¹⁶³ Fed. R. Civ. P. 65(d)(1)(C).

¹⁶⁴ Cf. *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))).

While judges must give reasons for adopting one party's proposed text,¹⁶⁵ that task is the function of an opinion.¹⁶⁶ Rule 23(c)(1)(B) regulates orders, not opinions.¹⁶⁷ Use of the word "order" suggests that the envisioned definition is much shorter than a "full and clear articulation of the litigation's contours at the time of class certification."¹⁶⁸ Unlike opinions, the typical order consists of a few sentences on a single page.¹⁶⁹ Judges generally refrain from including extraneous discussion in orders because the purpose of the order is to provide clear, direct instruction.¹⁷⁰ As a result, a rambling definition would be out of place in the kind of document the Rule governs.

Definition—whether of a class, a claim, or a defense—entails separating the certified from the noncertified. To achieve that goal with respect to claims or defenses, neither a carbon copy of the parties' allegations nor a hornbook deconstruction of the causes of action would be necessary or helpful. Shorthand citations suffice. For issue classes certified under Rule 23(c)(4), definition occurs naturally; courts cannot certify a particular issue without somehow naming it. In the end, therefore, defining class claims, issues, or defenses is simple. An order needs to state which claims (or issues or

¹⁶⁵ See, e.g., *New England Health Care Employees Pension Fund v. Woodruff*, 512 F.3d 1283, 1290–91 (10th Cir. 2008) (making this point with respect to settlement agreements).

¹⁶⁶ Even though the First Circuit misconstrues Rule 23(c)(1)(B), it recognizes that "[t]he rule says only that a court must define, not necessarily justify, a class and its claims." *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 40 n.19 (1st Cir. 2009).

¹⁶⁷ See Fed. R. Civ. P. 23(c)(1)(B) (discussing "an *order* that certifies a class action" (emphasis added)).

¹⁶⁸ *Contra Wachtel v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179, 186 (3d Cir. 2006).

¹⁶⁹ See, e.g., Fed. R. Civ. P. app. Form 82 (providing one-sentence sample order for assigning a matter to magistrate judge); *Dukes v. Wal-Mart Stores*, 222 F.R.D. 137, 188 (N.D. Cal. 2004) (issuing a 189-word order to certify a massive, nationwide class); Manual for Complex Litigation § 40.41 (4th ed. 2004) (setting out sample class-certification order of approximately one letter-sized page and defining example claims as "[a]ny claims for damages or injunctive relief under federal antitrust laws premised upon an alleged conspiracy among the defendants and other widget manufacturers to restrict competition in the manufacture, distribution, and sale of widgets by setting the minimum prices charged for widgets [during specific dates]").

¹⁷⁰ 60 C.J.S. *Motions and Orders* § 52 (2002); see also *Dawley v. Dawley*, 16 N.W.2d 827, 828 (Wis. 1944) ("Discussions of questions of law and other extraneous matters should not be included in an order.").

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defenses) are certified, excluding by implication those not identified. Nothing more is required.

B. Drafting History

Rule 23 has evolved by periodic amendment since its inception and was essentially rewritten in 1966, but drastic reform proposals have fared poorly since then.¹⁷¹ In 2003, however, rule-makers adopted several “nuts and bolts” amendments, including Rule 23(c)(1)(B).¹⁷² The Rule did not attempt to revise the standards for determining whether to certify a class and was instead enacted as one of several noncontroversial provisions that were purely “procedural in nature, often embodying the ‘best practices’ of the courts.”¹⁷³

The 2003 amendment process was methodical and multi-staged and thus produced an extensive paper trail. Rule 23(c)(1)(B) passed through seven stages of review en route to enactment: the Advisory Committee on Civil Rules suggested it and passed it to the Standing Committee on Rules of Practice and Procedure; the Standing Committee published it for public comment; the Advisory Committee considered the comments and recommended adopting the Rule; the Standing Committee did likewise; the Judiciary Committee of the United States concurred; the Supreme Court approved the Rule and reported it to Congress; and Congress, by doing nothing, expressed consent.¹⁷⁴ Because the Advisory and Standing Committees undertook the most rigorous review of the Rule,¹⁷⁵

¹⁷¹ See Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 356, 386–94 (1967); Rabiej, *supra* note 41, at 349–67 (describing failed amendments proposed in 1996).

¹⁷² Rabiej, *supra* note 41, at 368 & n.185, 371 (internal quotation marks omitted).

¹⁷³ *Id.* at 369.

¹⁷⁴ Cf. Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 Tex. Tech L. Rev. 323, 328–31 (1991) (explaining the general process for amending the Federal Rules of Civil Procedure); Paul J. Stancil, *Close Enough for Government Work: The Committee Rulemaking Game*, 96 Va. L. Rev. 69, 76–78, 132 (2010) (same).

¹⁷⁵ See 28 U.S.C. § 2073(b) (2006) (establishing the Standing Committee’s responsibility to thoroughly review all Advisory Committee recommendations); Rabiej, *supra* note 41, at 368–69 (explaining the Advisory Committee’s role in initiating the 2003 amendments to Rule 23); cf. Baker, *supra* note 174, at 329 (1991) (describing typical work allocations among committees).

their deliberations generated most of the relevant documents. Leading up to the 2003 amendments, both Committees produced volumes of informal records akin to legislative history, and the Advisory Committee prepared explanatory notes for official publication.

The formal Advisory Committee notes do not mention Rule 23(c)(1)(B), but the Committee's minutes, correspondence, and internal reports contain abundant evidence of the Rule's intended meaning. For those willing to consider this evidence,¹⁷⁶ its implications are striking. The Rule's drafting history mostly confirms what its text independently establishes: the phrase "class claims, issues, or defenses" exists to remind courts that class actions may be certified with respect to plaintiffs' claims, particular issues, or mandatory defendants' defenses.

"Claims, issues, or defenses" is a term of art that rose to prominence during an unsuccessful effort to substantially rewrite Rule 23 in the mid-1990s. A version of the phrase first appeared in a proposal to amend Rule 56(c) by requiring summary judgment motions to "describe the claims, defenses, or issues as to which summary adjudication is warranted."¹⁷⁷ The proposed amendment originally referred only to claims, but Advisory Committee members advocated adding "defenses" and "issues."¹⁷⁸ Unfortunately, Committee minutes do not explain why. While use in the Rule 56 context could imply that "claims, defenses, or issues" has some general meaning—probably with respect to preclusion—later re-

¹⁷⁶ The Supreme Court recently considered similar sources in construing Rule 23(b)(1)(B). See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842–45 (1999). Nevertheless, some judges and commentators reject even the official Advisory Committee notes as unreliable or non-authoritative interpretive guides. See, e.g., *Tome v. United States*, 513 U.S. 150, 168 (1995) (Scalia, J., concurring in part and concurring in the judgment) ("[Advisory Committee] Notes cannot, by some power inherent in the draftsmen, change the meaning that the Rules would otherwise bear."); Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 *Hastings L.J.* 1039, 1094 (1993) (arguing that, because the Supreme Court oversees the rule-making process, its own views in approving a rule may have differed from—and should outweigh—those of the Advisory Committee).

¹⁷⁷ Preliminary Draft of Proposed Amendments to the Fed. Rules of Civil Procedure and the Fed. Rules of Evidence, 137 *F.R.D.* 53, 142 (1991).

¹⁷⁸ Minutes of Meeting of May 22–24, 1991, Advisory Comm. on Civil Rules 13 (1991), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV05-1991-min.pdf>.

cords show that the phrase came to acquire specific meaning for class actions.

One proposal would have changed Rule 23(c)(1) to read: “When persons sue or are sued as representatives of a class, the court shall determine by order whether and with respect to what claims, defenses, or issues the action will be certified as a class action.”¹⁷⁹ This language almost perfectly prefigures Rule 23(c)(1)(B) as enacted in 2003. As in present Rule 23, however, the 1990s proposals did not restrict the “claims, defenses, or issues” phrase to Rule 23(c)(1) and instead used it as all-purpose shorthand for plaintiff, issue, and defendant classes. The “focal point” for the phrase would have been Rule 23(c)(4), which was slated for expansion to permit certification “with respect to particular claims, defenses, or issues.”¹⁸⁰ The drafters’ repetition of the phrase was a “deliberate attempt to focus attention on, and to encourage [issue certification],” an infrequently used procedure.¹⁸¹

Among many other provisions that would have used the phrase to this end,¹⁸² the most conspicuous was the first sentence of Rule 23. In amended form, it would have stated that “[o]ne or more members of a class may sue or be sued as representative parties on behalf of all if—with respect to the claims, defenses, or issues certified for class action treatment”¹⁸³—the requirements of Rule 23(a) are met. In a proposed note, the Advisory Committee explained that:

¹⁷⁹ Fed. R. Civ. P. 23(c)(1) (Feb. 1996 “Comprehensive Revision” Draft), *in* 1 Leonidas Ralph Mecham, Director, Administrative Office of the United States Courts, Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, at 58 (1997) [hereinafter Working Papers].

¹⁸⁰ Edward H. Cooper, Rule 23: Challenges to the Rulemaking Process, 71 N.Y.U. L. Rev. 13, 34, 72 (1996).

¹⁸¹ *Id.* at 34; see also Fed. R. Civ. P. Comm. Note (Apr. 1994 Draft), *in* Working Papers, *supra* note 179, at 39 (“Under former paragraph (4), some issues could be certified for resolution as a class action, while other matters were not so certified. By adding similar language to other portions of the rule, the Committee intends to emphasize the potential utility of this procedure.”).

¹⁸² See Proposed Amendments to Rules of Civil Procedure (Apr. 1994 Draft), *in* Working Papers, *supra* note 179, at 26 (using phrase in class-notice rule); Fed. R. Civ. P. 23(b)(3)(iii) (Feb. 1996 Comprehensive Revision Draft), *in* Working Papers, *supra* note 179, at 56 (using phrase in proposed addition to damage-class prerequisites).

¹⁸³ Fed. R. Civ. P. 23(a) (Apr. 1994 Draft), *in* Working Papers, *supra* note 179, at 19.

The words “claims, defenses, or issues” are used in a broad and non-legalistic sense. While there might be some cases in which a class action would be authorized respecting a specifically defined cause of action, more frequently the court would set forth a generalized statement of the matters for class action treatment, such as all claims by class members against the defendant arising from the sale of specified securities during a particular period of time.¹⁸⁴

The Committee further emphasized that its semantic focus on issue classes did “no more than underscore options” already allowed by Rule 23.¹⁸⁵ The “claims, defenses, or issues” theme would simply remind courts to use Rule 23(c)(4) when “separate controversies . . . exist between plaintiff class members and a defendant which should not be barred under the doctrine of claim preclusion.”¹⁸⁶

Although the above proposals did not pass, the “claims, defenses, or issues” phrase lived on. As already indicated, the Advisory Committee transposed it into “claims, issues, or defenses”¹⁸⁷ and in 2003, inserted that phrase into three parts of Rule 23.¹⁸⁸ The understood meaning of “claims, issues, or defenses” did not wane in the interim. At a 2001 meeting of the Advisory Committee’s Rule 23 Subcommittee, rule-makers again contemplated adding the phrase to Rule 23(c)(1).¹⁸⁹ Some members questioned the pro-

¹⁸⁴ Fed. R. Civ. P. 23 Comm. Note (Apr. 1994 Draft), *in* Working Papers, *supra* note 179, at 35–36.

¹⁸⁵ Minutes of Meeting of February 16–17, 1995, Advisory Comm. on Civil Rules (1995), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/min-cv2.htm>.

¹⁸⁶ Fed. R. Civ. P. 23 Comm. Note (Apr. 1994 Draft), *in* Working Papers, *supra* note 179, at 34.

¹⁸⁷ Some may argue that this transposition bears on the intended meaning of the phrase. Even the mid-1990s amendments appeared to use the phrases interchangeably, however. See, e.g., Fed. R. Civ. P. 23(b)(3)(iii) (Feb. 1996 “Comprehensive Revision” Draft), *in* Working Papers, *supra* note 179, at 56 (adding requirement for Rule 23(b)(3) classes that “the prospect of success on the merits of the class claims, issues, or defenses is sufficient to justify the costs and burdens imposed by certification”).

¹⁸⁸ See Proposed Amendments to the Federal Rules of Civil Procedure (Mar. 2003 “Strike-Out” Draft), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/congress0303/CV-Redline.pdf> (adding “claims, issues, or defenses” to what became Rules 23(c)(1)(B), (c)(2)(B)(iii), and (e)).

¹⁸⁹ Reporter’s Notes, Rule 23 Subcomm. (Jan. 28–29, 2001), *in* Advisory Comm. on Civil Rules, 102–03 (March 12, 2001), available at <http://www.uscourts.gov/uscourts>

priety of emphasizing “issues” because of a then-prevalent trend among circuit courts “cast[ing] considerable doubt on issues classes.”¹⁹⁰ Subcommittee members acknowledged that “[i]f we leave ‘issues’ in [Rule 23 (c)(1)(B)], we may seem to encourage issues classes” but also noted that “earlier Advisory Committee consideration of amendments that would emphasize issues classes [was] designed simply to encourage use of authority already clearly given.”¹⁹¹

After 2001, Advisory Committee records disclose little about the meaning of “claims, issues, or defenses.” During their deliberations, rule-makers paid less attention to Rule 23(c)(1)(B) than to many of the other 2003 amendments to Rule 23.¹⁹² Three documents, however, arguably dilute the significance of the foregoing drafting history. An Advisory Committee report characterizes Rule 23(c)(1)(B) as “requiring that a court must define the class it is certifying and identify the class claims, issues, *and* defenses,”¹⁹³ and subsequent reports by the Standing Committee¹⁹⁴ and Judicial Conference¹⁹⁵ repeat this language.

/RulesAndPolicies/rules/AgendaBooks/Civil/CV2001-03.pdf [hereinafter Subcommittee Notes]. These notes were “not . . . reviewed by the Subcommittee. . . . [They] clearly include omission of many useful things that were said, and no doubt include inaccurate renditions of some of the things that were said.” *Id.* at 100.

¹⁹⁰ *Id.* at 103.

¹⁹¹ *Id.*

¹⁹² Judge David F. Levi, the then-chairman of the Advisory Committee, called the amendment “non-controversial.” Minutes of Meeting of June 7–8, 2001, Comm. on Rules of Practice and Procedure 21 (2001), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06-2001-min.pdf>. In a twenty-three-page portion of a document explaining the 2003 amendments to Rule 23, only five lines discuss Rule 23(c)(1)(B). See Report of the Judicial Conf. Comm. on Rules of Practice and Procedure 8–31 (Sept. 2002), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST9-2002.pdf>.

¹⁹³ Report of the Civil Rules Advisory Comm. from David F. Levi, Chair, Advisory Comm. on the Fed. Rules of Civil Procedure, to the Honorable Anthony J. Scirica, Chair, Standing Comm. on Rules of Practice and Procedure 33 (May 14, 2001) [hereinafter Levi Report] (emphasis added), available at www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2001.pdf.

¹⁹⁴ Summary of the Proposed Amendments to the Fed. Rules from Judge Anthony J. Scirica to the Chief Justice of the United States and Associate Justices of the United States 4 (Nov. 18, 2002) [hereinafter Summary of Proposed Rules], available at www.uscourts.gov/uscourts/RulesAndPolicies/rules/supct1202/summary.pdf.

¹⁹⁵ Report of the Judicial Conf. Comm. on Rules of Practice and Procedure, *supra* note 192, at 11.

At least facially, the committees' casual substitution of the conjunctive "and" for the disjunctive "or" may signify that rule-makers attributed no special meaning to "claims, issues, or defenses" and did not intend to establish a series of alternatives. It could also be an oversight; some errors are to be expected in reports designed for internal consumption. Neither view is indisputable, but the balance tips toward the latter. For one, the Manual for Complex Litigation faithfully copies the Advisory Committee's summary of Rule 23(c)(1)(B) aside from one change—inserting the correct "or" in place of the offending "and."¹⁹⁶ More importantly, the Rule itself says "or," and scattered contradictions should not obscure its plain text and otherwise consistent drafting record.¹⁹⁷

While drafting history amply elucidates the subject for definition, it offers fewer insights about the scope of definition. At one point, the Advisory Committee deliberated replacing "define" with "describe" to harmonize Rule 23(c)(1)(B) with Rule 23(c)(3)(A), which provided that class-action judgments must "describe those whom the court finds to be members of the class."¹⁹⁸ This suggestion was dropped, however, and other references to the meaning of "define" are indirect at best. Some Advisory Committee members expressed concern that the definition requirement "may demand too much of foresight, and require frequent amendment,"¹⁹⁹ and some Rule 23 Subcommittee members noted that "[t]he way in which the class claims are defined affects many things in addition to claim preclusion: notice, the decision of class members whether to opt out, and the like."²⁰⁰

¹⁹⁶ Manual for Complex Litigation § 21.21 (4th ed. 2004).

¹⁹⁷ See *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 599 (2004) (concluding that a single contradictory reference in legislative history "cannot stand against a tide of context and history"); *DIRECTV v. Pepe*, 431 F.3d 162, 169 (3d Cir. 2005) (following "the balance of the legislative history" in an instance involving contradictions in the legislative record); *Stromberg Metal Works v. Press Mech.*, 77 F.3d 928, 931 (7th Cir. 1996) ("When text and legislative history disagree, the text controls.").

¹⁹⁸ Memorandum from Lee H. Rosenthal et al. to Comm. on the Fed. Rules of Civil Procedure, in *Advisory Comm. on Civil Rules 3, 15 & n.2* (March 12, 2001), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2001-03.pdf>.

¹⁹⁹ Minutes of Meeting of March 12, 2001, Civil Rules Advisory Comm. 3 (2001) [hereinafter CRAC 3/01 Minutes], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CRACMM01.pdf>.

²⁰⁰ Subcommittee Notes, *supra* note 189, at 103.

Either remark could be manipulated to require a broad scope of definition, but the clearer indicia of intended meaning are rule-makers' frequent statements that the Rule requires courts to "*identify* the class claims, issues, [or] defenses."²⁰¹ To "*identify*" something is to recognize and then name it.²⁰² If asked to identify the suspect in a line-up, for instance, an eyewitness would simply say "number two" or "the man wearing green." The witness generally would not offer an elaborate physical description to identify someone standing in front of her. By instructing courts to identify claims, issues, or defenses, the Advisory Committee implies that courts need only look to the claims, issues, or defenses in the record and then point out the certified ones using whatever ready-made labels seem appropriate.

C. Purposes of the Rule

Rule 23(c)(1)(B) prescribes the contents of class-certification orders primarily to "ensur[e] an adequate record for appellate review."²⁰³ If an order records which claims, issues, or defenses have been certified, circuit courts can more readily assess the order's worthiness for interlocutory appeal and its compliance with the substantive requirements of Rules 23(a) and (b).²⁰⁴ Beyond facilitating appellate review, the definition of claims, issues, or defenses may simplify later decisions about the preclusive effects of class judgments, establish "a framework for discovery and settlement negotiations," and explain "the interests at stake" to class members.²⁰⁵ Together with the other Rule 23 amendments enacted in 2003, Rule 23(c)(1)(B) also was designed to prevent "improvident certifications," protect class members, and "provide the district

²⁰¹ See *supra* text accompanying notes 193–95 (emphasis added).

²⁰² Cf. Oxford English Dictionary (online ed. 2010), <http://www.oed.com/view/Entry/90999> (defining "identify" to mean, among other things, "[t]o ascertain or assert what a thing or who a person is; to determine the identity of; to recognize as belonging to a particular category or kind").

²⁰³ Rabiej, *supra* note 41, at 371.

²⁰⁴ See Report of the Judicial Conf. Comm. on Rules of Practice and Procedure, *supra* note 192, at 11; Summary of Proposed Rules, *supra* note 194, at 4.

²⁰⁵ Subcommittee Notes, *supra* note 189, at 103; CRAC 3/01 Minutes, *supra* note 199, at 3; Minutes, Civil Rules Advisory Committee 16 (Apr. 23–24, 2001), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CRAC401.pdf>.

courts with the tools, authority, and discretion to closely supervise class-action litigation.”²⁰⁶

These purposes illuminate the meaning of the Rule because appellate review, preclusion queries, and discovery plans all point to a particular form of definition. The common problem in those instances is culling a full, fixed universe of claims from voluminous records that may reference many claims without stating which ones bind the entire class. One species of definition would help: a statement indicating which matters are to be treated class-wide and excluding all others by implication. Conversely, a definition would prove counterproductive if it included details describing the “full scope and parameters” of all questions headed for class-wide litigation. In signaling to an appellate court or the litigants which claims are certified and which are not, wordiness is a barrier and a distraction. The purposes of Rule 23(c)(1)(B) thus call for a definition that excludes, not one that explains.

At the same time, however, the Rule’s purposes offer some support for the Third Circuit’s more stringent definitional requirements. One way to ease appellate review is to provide “a written baseline against which to measure the propriety of the certification [decision],”²⁰⁷ and a detailed definition of claims, issues, and defenses would serve that goal. Additionally, the Third Circuit has inferred that another purpose of the Rule is to direct district courts’ attention to “the issues likely to be presented at trial and . . . whether they are susceptible [of] class-wide proof.”²⁰⁸ If the Rule actually has that purpose, then it arguably does demand a list of issues destined for trial even in cases involving no Rule 23(c)(4) issue class.

In the end, discerning and applying the purposes of Rule 23(c)(1)(B) may present a “controversy no less difficult to resolve than the ultimate question of intent or meaning.”²⁰⁹ The purposes named by rule-makers tend to call for a narrow scope of definition,

²⁰⁶ Levi Report, *supra* note 193, at 28; see also Report of the Judicial Conf. Comm. on Rules of Practice and Procedure, *supra* note 192, at 8.

²⁰⁷ *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 243 F.R.D. 17, 18 (D. Me. 2007), vacated on other grounds, 522 F.3d 6, 29–30 (1st Cir. 2008).

²⁰⁸ *Wachtel v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179, 186 (3d Cir. 2006) (quoting Fed. R. Civ. P. 23(c)(1)(A) advisory committee’s note).

²⁰⁹ See 2A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 45:9 (7th ed. 2007) (noting a general critique of purposive interpretation).

but the Third Circuit's contrary deductions from the same purposes are defensible. For that reason, the argument from purpose is comparatively weak. When examined with text and history in mind, however, the purposes of Rule 23(c)(1)(B) generally do reinforce the notion that the Rule's requirements are minimal.

CONCLUSION

Rule 23(c)(1)(B) is as unremarkable as it first appears: an order that certifies a class action must (1) define the class and (2) define the class claims, the class issues, or the class defenses. Because only one item in the latter series needs to be defined, the Rule usually instructs district courts to indicate which of the plaintiffs' claims will be litigated class-wide. Often, all claims are class claims, and the certification order can incorporate the entire complaint by reference. In other cases, some claims may be dismissed or severed for individual treatment, and claim definition will require listing statutory provisions, common-law causes of action, or numbered counts from the complaint. For mandatory-defendant or Rule 23(c)(4) issue classes, an order should define certified defenses or issues instead of claims, but most certification orders will involve only claims because issue and defendant classes remain uncommon.²¹⁰ These methods of satisfying Rule 23(c)(1)(B) are far from theoretical; they represent the prevailing practices among district courts in multiple circuits.²¹¹

Contrary to influential appellate decisions, Rule 23(c)(1)(B) does not require class-certification orders to expound on the details of all issues in a suit. The Rule mentions issues and defenses to highlight under-used certification techniques, not to transform every certification order into a catalog of minutia. *Wachtel* misreads the text and history of the Rule, and the consequences transcend Scholastic nitpicking about how many issues can dance on the face of a class-certification order.

The practical effect is that *Wachtel* transforms Rule 23(c)(1)(B) from a fixed floor into a floating bar over which current practices

²¹⁰ See Willging et al., *supra* note 27, at 119–23 (reporting infrequent use of issue and defendant classes).

²¹¹ See *supra* Subsection II.C.2.

“often” fail to leap.²¹² Under *Wachtel*, district courts have to elaborate to some extent on some mixture of claims, issues, and defenses, but the proper extent and mixture will be uncertain if not entirely subjective. Instead of providing clear direction, the Third Circuit leaves “practitioners and district court judges [to] learn by trial and error what satisfies the requirements of Rule 23(c)(1)(B).”²¹³ This void entices litigants to file motions and appeals about a purely formalistic matter—the organizational completeness of a court order—that has little relation to the far more important question of whether the class was improvidently certified. Beyond delaying resolution of the litigants’ own case, *Wachtel*-inspired motions entangle district courts in trivial disputes about formatting at a time when the number of new criminal and civil filings continues to increase.²¹⁴

Wachtel also raises broader methodological concerns and undermines the uniformity and consistency that the Federal Rules bring to litigation. When courts blur bright lines in the Federal Rules, trouble often follows. As Judge Easterbrook has noted, judges err if they “[b]oost[] the level of generality” in a Federal Rule “by attempting to discern and enforce legislative ‘purposes’ or ‘goals’ instead of the enacted language.”²¹⁵ Congress designed an official rulemaking structure for a reason, and it should not be circumvented by “turn[ing] a rule into a standard.”²¹⁶ Perhaps the Federal Rules ought to force courts to itemize all litigated questions of law and fact in every class-certification order, but Rule 23(c)(1)(B) does not do so as written. Rule-makers never engaged in the debate or solicited the public comments that would rightfully precede such a change.²¹⁷

²¹² See *Wachtel*, 453 F.3d at 184.

²¹³ David M. Brodsky & John M. Falzone III, *Want to Certify A Class Action?*, N.Y. L.J., Dec. 4, 2006, at S8.

²¹⁴ See Chief Justice John G. Roberts, Jr., 2010 Year-End Report on the Federal Judiciary 10–11 (2010) (reporting two-percent increases in the number of new civil and criminal cases filed in federal court in 2010), available at <http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf>.

²¹⁵ *Jaskolski v. Daniels*, 427 F.3d 456, 462 (7th Cir. 2005) (discussing Federal Rule of Criminal Procedure 6(e)). I thank Professor Caleb Nelson for bringing this case to my attention.

²¹⁶ *Id.* at 461–62.

²¹⁷ See *supra* text accompanying note 174 (describing the rulemaking process).

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Disorder Certifying a Class

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A comparison of Rule 23(c)(1)(B) to one of its state counterparts illustrates the point. In Texas, certification orders must include “(i) the elements of each claim or defense asserted in the pleadings; (ii) any issues of law or fact common to the class members; (iii) any issues of law or fact affecting only individual class members; (iv) the issues that will be the object of most of the efforts of the litigants and the court;” and four other details.²¹⁸ Texas rule-makers followed official processes to create that rule; federal rule-makers did not. The Third Circuit was therefore wrong to read seven words in Rule 23(c)(1)(B) as effectively coextensive with the meticulous Texas rule. Federal practice arguably would benefit from a Texas-like approach that discourages imprudent certification, but the correct method for adopting that approach is to amend the Federal Rules.

Because *Wachtel* misinterprets Rule 23(c)(1)(B) and encourages wasteful quarrels, courts outside the Third Circuit should decline to follow it. The alternative construction suggested above is better aligned with the Rule’s text and more workable in practice. If courts adopt that construction, the Rule will return to its intended status as an easy-to-satisfy administrative instruction, and the tide of *Wachtel*-provoked motions should quickly recede.

²¹⁸ Tex. R. Civ. P. 42(c)(1)(D).
