

CORPORATE LITIGATION:

THE USE AND LIMITS OF ISSUE CERTIFICATION

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The interplay between two provisions of Rule 23, the federal class action rule, has engendered a longstanding circuit split which deepened last month. Rule 23(b)(3) permits class certification where the court finds that questions common to class members presented by a claim predominate over individual ones. Rule 23(c)(4) provides that, “[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues.” If a claim as a whole does not meet the predominance requirement, under what circumstances does Rule 23(c)(4) nevertheless authorize the district court to carve out one or more discrete issues for class treatment? May a court effectively sidestep individualized issues that would otherwise prevent class certification by the expedient of issue certification? In *Martin v. Behr Dayton Thermal Products*, 2018 WL 3421711 (6th Cir. July 16, 2018), the U.S. Court of Appeals for the Sixth Circuit joined the Second and Ninth Circuits and endorsed broad use of issue classes, permitting class treatment of seven issues going to the defendants’ knowledge and conduct in a groundwater contamination suit. Three day days earlier, a federal court had declined to certify issue classes proposed by former NHL players seeking medical monitoring for brain injuries allegedly incurred during their professional careers. *In re National Hockey League Players’ Concussion Injury Litigation*, 2018 WL 3421343 (D. Minn. July 13, 2018). As the plaintiffs increasingly propose issue certification as an alternative to class certification of their causes of action as a whole, the need for definitive parameters on use of the device remains clear.

Background

Rule 23(c)(4) provides that “[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues.” The text of Rule 23(c)(4) does not purport to modify the certification requirements of Rule 23(b); rather, it provides for issue-only adjudication only “[w]hen appropriate.” Nor does it establish a separate set of requirements to guide the “appropriate[ness]” inquiry, suggesting that issue certification is “appropriate” where the requirements of Rule 23 are otherwise satisfied. If Rule 23 were intended to provide a stand-alone basis for class certification, Rule 23(c)(4) would logically have been placed alongside the other Rule 23(b) subsections which establish when certification is proper. *Gunnells v. Healthplan Services*, 348 F.3d 417, 447 (4th Cir. 2003) (Rule 23(c)(4) does not provide “a fourth avenue” to class certification “on equal footing with Rule 23(b).”) (Niemeyer, J., dissenting).

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Rule 23 recognizes that it may be worthwhile to achieve the efficiencies and benefits of class-wide adjudication of one or more issues that are common to all class members even if other issues will have to be litigated separately by individual class members. The Rules Committee Note devoted two sentences to issue certification, suggesting that the procedure may be used to bifurcate the “adjudication of liability to the class” from follow-on proceedings needed to “prove the amounts of [class member] claims.” Consistent with that intent, in the only case cited by the committee reporter as supporting the need for Rule 23(c)(4), the classwide trial established the defendant’s “liability” to all class members and left only individual damages calculations for follow-on proceedings, see *Union Carbide & Carbon v. Nisley*, 300 F.2d 561, 589 (10th Cir. 1961). The purpose of Rule 23(c)(4) therefore is to permit courts in certain circumstances the option not to make class certification an all or nothing proposition.

The challenge in implementing this rule is determining when certification of particular sub-issues for class treatment will be efficient while ensuring fairness to defendants. Three approaches to issue certification have emerged. In the Fifth Circuit, “a cause of action, as a whole, must satisfy the predominance requirement of (b)(3);” plaintiffs “cannot manufacture predominance through the nimble use of subdivision (c)(4),” see *Castano v. American Tobacco*, 84 F.3d 734, 745 n.21 (5th Cir. 1996). The Second and Ninth (and now Sixth) Circuits have encouraged district courts to take full advantage of issue certification to reduce the number of disputed issues in complex litigation and achieve judicial efficiencies. The Third Circuit, “[r]ather than joining either camp in the circuit disagreement,” has adopted a multi-factor balancing test proposed by the American Law Institute, see *Gates v. Rohm & Haas*, 655 F.3d 255, 272 (3d Cir. 2011).

Recent Decisions

The Sixth Circuit adopted a similar broad approach in *Martin*, affirming certification of seven liability-related issues going to defendant’s conduct and knowledge in a groundwater contamination action. Plaintiffs allege that the groundwater below their residences in a Dayton, Ohio neighborhood is contaminated with volatile organic compounds. They attribute the alleged contamination to chemicals allegedly released by the defendants at nearby commercial properties, and assert a variety of common law claims, including trespass, nuisance and negligence. The plaintiffs sought class certification under Rule 23(b)(3), but the district court declined to certify the class, citing the need for each member of the purported class to rely on highly individualized proof to establish the injury-in-fact and proximate cause elements of their claims. Turning to the plaintiffs’ alternative request for certification of a class on several liability-related issues under Rule 23(c)(4), the district court determined that seven narrow issues addressing defendants’ conduct and awareness of potential contamination risks were “suitable for class treatment” under Rule 23(c)(4) “even though plaintiffs have failed to satisfy the predominance requirement of Rule 23(b)(3).”

The Sixth Circuit affirmed the issue certification. The court surveyed the competing approaches employed by federal circuits, and adopted the “broad view” of issue certification. When issue certification is sought, the Sixth Circuit ruled, the predominance inquiry should tightly focus on whether common questions predominate within each issue for which issue certification is requested (as opposed to the claim as a whole). Rejecting the narrow approach, the court said that “[a] requirement that predominance must first be satisfied for the entire cause of action would undercut the purpose of Rule 23(c)(4) and nullify its intended benefits.” According to the court, the broad view—which applies the predominance inquiry to a narrow issue or issues embedded within a claim—“respects each provision’s contribution to class determination by maintaining Rule 23(b)(3)’s rigor without rendering Rule 23(c)(4) superfluous. The broad approach retains the predominance factor, but instructs courts to engage in the predominance inquiry after identifying issues suitable for class treatment.” In response to concerns about inefficient use of issue certification, the court cast the superiority

requirement of Rule 23(b)(3) as a safeguard against issue certifications that do little to advance the case. Issues that present “minor or insignificant common questions” would not be properly certified, the court reasoned, because class treatment of issues too thinly sliced to deliver adjudicative efficiencies would contravene the requirement that class treatment be superior to other available methods for adjudicating the controversy.

Addressing the certification at hand, the court acknowledged that individualized, non-classwide proof was needed to determine the injury-in-fact and causation elements of the plaintiffs’ claims, and it did not disturb the district court’s determination that these individualized issues precluded certification of any claim as a whole. With the predominance requirement narrowed to assess each of the seven issues certified for classwide treatment, however, common issues predominated because each certified issue narrowly focused on an aspect of the defendants’ knowledge and conduct regarding contamination, “and need only be answered once because the answers apply in the same way to each property owner” in the class. Although the district court never reached the superiority requirement (because it ruled individual issues predominated for the claims as wholes), the Sixth Circuit concluded that the issue classes satisfied the superiority requirement: Even though “[c]lass treatment of the seven certified issues will not resolve the defendants’ liability entirely ... it will materially advance the litigation” because the answers to the certified questions would apply to every class member’s claim.

The court sidestepped the defendants’ argument that the issue certification violated the Seventh Amendment guarantee of the right to a jury trial and its reexamination clause, which precludes “reexamination” of any fact tried by a jury. Although the district court had mentioned the possibility of using a special master to resolve issues remaining after a jury decided the seven issues certified for class treatment, the Sixth Circuit noted that no post-trial procedures had been fixed.

In *National Hockey*, a Minnesota district court declined to certify a nationwide (b)(3) medical monitoring class on the ground that variances in applicable state laws precluded certification. The court then rejected the plaintiffs’ proposal to certify issue classes relating to the defendants’ alleged duties to NHL players and causal links between NHL play and increased risk of traumatic brain injury, reasoning that resolution of these discrete issues would not obviate individualized choice of law determinations for each class member nor increase the efficiency of the litigation as a whole. In so holding, the court invoked the Eighth Circuit’s skepticism—shared with the Fifth Circuit—of issue certification rulings that “essentially manufacture a case that would satisfy the Rule 23(b)(3) predominance inquiry,” 2018 WL 3423143, at *16 (quoting *Ebert v. General Mills*, 823 F.3d 472, 479 (8th Cir. 2016)).

Conclusion

In practice, requests for issue class certification usually turn on the court’s assessment of whether resolution of particular common issues would materially advance the disposition of the litigation as a whole. Resolving on a classwide basis anything short of liability does not materially advance the litigation, and does not ensure that all class member claims can productively be litigated at once, wasting judicial and party resources. Expansive use of issue certification also threatens important rights. For example, because class actions often cannot be divided into distinct issues, the facts and law that are relevant to a purported “common” issue will frequently overlap with the issues remaining to be tried individually. This overlap produces Seventh Amendment Reexamination Clause problems where the proposed common issue phase would be decided by a jury, and the remaining issues by a second jury. Strict enforcement of Rule 23(b)’s requirements is necessary

to ensure that class actions are conducted consistent with their purposes and with the substantive rights of the parties involved.

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