

## Advisory | Class Action Litigation



June 2020

### Strategies for Defending Issue Class Actions

Historically, plaintiffs seeking monetary damages and wishing to pursue their case as a class action have sought certification under Federal Rule of Civil Procedure 23(b)(3), but this has become increasingly difficult. In recent years, there has therefore been a rise in the invocation of Rule 23(c)(4) at the class certification stage, often as an alternative argument (if the court finds that plaintiffs have not met their burden under Rule 23(b)(3)), but even occasionally as a standalone request.

The newfound focus on Rule 23(c)(4) at the class certification stage has permitted plaintiffs to present their liability theories earlier in the case, and has also permitted certification in certain cases that otherwise may never have been certified due to highly individualized elements of the cause of action, such as injury, reliance, and causation. And once a class action is certified by a district court, the defendant may have greater exposure than if the class members were compelled to pursue their purported claims individually.

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.” Invoking this subsection is a tactic that, according to plaintiffs, allows them to circumvent the demanding predominance requirement of Rule 23(b)(3) altogether, which would compel plaintiffs to show that common questions predominate over questions affecting only individual purported class members. This allows them to jump directly from Rule 23(a)’s prerequisites to asserting that certain “issues” within a cause of action need be certified, as opposed to the cause of action as a whole.

Put differently, plaintiffs have invoked this rule not only as a method to secure certification (because without it, their case would be unable to proceed as a class), but as a method to ensure that the court need only consider whether specific “issues” are common to and typical of the class, generally focused on the alleged conduct or purported liability of the defendant.

The federal courts of appeals vary widely in addressing “issue” class certification, and in 2019 the U.S. Supreme Court declined to weigh in, leaving the jurisdictions to diverge in their application of Rule 23(c)(4). One thing, however, is clear—in the face of increasing requests for issue class certification, defendants should be prepared to shift course on strategy and develop new and innovative ways of thinking about and defending class actions.

This article will provide an overview of issue class certification, as well as strategic considerations for defending such cases.

### **The Traditional Path**

To achieve certification under Rule 23(b)(3), plaintiffs must first satisfy the prerequisites in Rule 23(a): numerosity, typicality, commonality, and adequacy of class representation. If these prerequisites are established, and plaintiffs have satisfied the implicit requirements of an adequate class definition and an ascertainable class, plaintiffs must further demonstrate the specific requirements of predominance and superiority.

The Supreme Court has clarified plaintiffs’ heightened burden at the class certification stage, emphasizing that Rule 23 requires plaintiffs to “affirmatively demonstrate” that all requirements of the rule have been satisfied. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). In so doing, the Supreme Court highlighted the “close look” and “rigorous analysis” a federal district court must undertake to determine whether certification is appropriate, as well as the high burden plaintiffs face in establishing the most demanding criterion of them all—predominance.

Predominance requires that plaintiffs establish that “questions of law or fact common to class members predominate over any questions affecting only individual members.” Plaintiffs often fail at the class certification stage because of the lack of predominance, and this requirement is often the focal point of the defense’s opposition.

In *Comcast*, for example, the Supreme Court held that plaintiffs’ class action had been improperly certified under Rule 23(b)(3) because “[q]uestions of individual damage calculations [would] inevitably overwhelm questions common to the class.” 569 U.S. at 34. The plaintiffs’ failure to offer a methodology for calculating damages on a class-wide basis that was tied to their theory of liability was fatal to their certification request, and allowing them to proceed, the court explained, “would reduce Rule 23(b)(3)’s predominance requirement to a nullity.”

### **Plaintiffs Skirt Predominance**

The plaintiffs’ bar has caught on to Rule 23(c)(4) as an option if predominance cannot be met under Rule 23(b)(3), with some firms touting its availability in publications and on websites.

Under Rule 23(c)(4), plaintiffs limit their certification request to specific “issues,” claiming, for example, that the defendant’s liability is capable of resolution on a class-wide basis with any individualized determinations, such as damages, to follow. In so doing, they seek to bypass Rule 23(b)(3)’s requirement

that common issues predominate within their cause of action. They also seek relatively easier access to a litigation mechanism that is an exception and not the rule.

### The Circuit Split

The U.S. courts of appeals differ in how they interpret the interplay between Rule 23(b)(3) and 23(c)(4). The Fifth Circuit has taken the “narrow view,” treating subsection (c)(4) as a housekeeping measure and not an independent method to achieve class certification. Conversely, many circuits have adopted the “broad view,” permitting certification of “issue classes” even if common questions do not predominate as to the claim as a whole. The Third Circuit has crafted its own multi-factor balancing test, and the remaining circuits have yet to rule definitively. These diverging views are explored below.

#### The Narrow View

The Fifth Circuit set forth its narrow view in *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). In that tobacco failure-to-warn case, the Fifth Circuit reversed certification on the issues of core liability and punitive damages, explaining that a “district court cannot manufacture predominance through the nimble use of subdivision (c)(4).” Rather, “[t]he proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial.” In reversing certification, the Fifth Circuit also expressed concern that bifurcation of issues—particularly dividing liability from comparative negligence and reliance—would violate the Seventh Amendment, which entitles parties to have fact issues decided by a jury and prohibits them from being reexamined.

Since *Castano*, the Fifth Circuit has continued to limit issue class certification to instances where “the cause of action, taken as whole, satisfies the predominance requirement.” *Corley v. Orangefield Indep. Sch. Dist.*, 152 Fed. Appx. 350, 355 (5th Cir. Oct. 13, 2005); *see also, e.g., Brawley v. Bath & Body Works, LLC*, 2019 BL 509122, at \*7 (N.D. Tex. Sept. 25, 2019) (rejecting certification of common liability issues under Rule 23(c)(4) where “variations in state law will swamp any common issues and defeat predominance”); *Paternostro v. Choice Hotel Int’l Servs. Corp.*, 309 F.R.D. 397, 405 (E.D. La. Aug. 27, 2015) (rejecting issue class certification as “Rule 23(c)(4) is not a stand-alone clause. It does not permit plaintiffs to ignore the requirements of 23(a) or (b). Plaintiffs cannot sever issues in an attempt to circumvent Rule 23(b) requirements.”).

For claims that satisfy all of Rule 23(b)(3)’s requirements, the Fifth Circuit has applied its narrow view to approve multi-phase trials, with common liability issues to be tried together and individualized issues to follow. In *Mullen v. Treasure Chest Casino, LLC*, for example, the Fifth Circuit affirmed certification of a class of former employees who allegedly suffered respiratory illness. 186 F.3d 620, 623 (5th Cir. 1999). Under the district court’s trial plan, common liability issues would be tried together in an initial trial phase, with causation, damages and comparative negligence to be tried subsequently “in waves of approximately five class members at a time.”

The Fifth Circuit agreed with this approach, finding that common issues predominated within the claim and that bifurcation would promote judicial economy. Similarly, in *In re Deepwater Horizon*, the Fifth Circuit reiterated its view that bifurcation at trial is proper under Rule 23(c)(4) so long as the common issues “predominated over the issues unique to individual claimants.” 739 F.3d 790, 815-816 (5th Cir. 2014). Plaintiffs in the Fifth Circuit will thus only be permitted to invoke Rule 23(c)(4) if predominance has been established and in the context of effective trial management.

### The Broad View

In contrast, multiple circuits have adopted the view that issues may be certified under Rule 23(c)(4) even if predominance has not been established under (b)(3).

In *Valentino v. Carter-Wallace, Inc.*, the Ninth Circuit advanced the broad view: “[e]ven if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)[] and proceed with class treatment of these particular issues.” 97 F.3d 1227, 1234 (9th Cir. 1996). Some courts in the Ninth Circuit have since followed and developed the broad interpretation espoused by *Valentino*. See, e.g., *Kamakahi v. Am. Soc’y for Reprod. Med.*, 305 F.R.D. 164 (N.D. Cal. 2015) (certifying liability issue class even though claim as a whole did not satisfy predominance).

In *In re Nassau Cty. Strip Search Cases*, the Second Circuit “agree[d] with the Ninth Circuit’s view” of Rule 23(c)(4). 461 F.3d 219, 226 (2d Cir. 2006). After their motion for 23(b)(3) certification was denied, plaintiffs sought certification of a liability-only issue class. The district court denied certification, relying on *Castano*, and the Second Circuit reversed, holding that “a court may employ subsection (c)(4) to certify a class as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)’s predominance requirement.”

More recently, the Southern District of New York applied the broad view in *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 407 F. Supp. 3d 422 (S.D.N.Y. 2019). There, plaintiffs alleged an antitrust conspiracy and sought certification pursuant to Rule 23(b)(3). The court concluded that plaintiffs failed to establish predominance because a number of highly material issues would require individualized inquiry. The court noted that “[t]he predominance inquiry is a core feature of the Rule 23(b)(3) class mechanism” and that “[w]here individualized questions permeate the litigation, those fatal dissimilarities among putative class members make use of the class-action device inefficient or unfair.” Nevertheless, the court granted certification under Rule 23(c)(4) on two issues: the existence of a conspiracy and participation in the conspiracy.

The Sixth and Seventh Circuits have also adopted the broad view. In *Martin v. Behr Dayton Thermal Prod. LLC*, the Sixth Circuit affirmed issue class certification in a purported groundwater contamination case, noting that the proposed “issues are questions that need only be answered once because the answers apply in the same way to each property owner within the plumes.” 896 F.3d 405, 414 (6th Cir. 2018). And in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, the Seventh Circuit reversed denial of certification under Rule 23(c)(4), even though “hundreds of separate trials” would be required to determine “which class members were actually adversely affected” by the defendant’s business policies and “if so what loss he [allegedly] sustained.” 672 F.3d 482, 491 (7th Cir. 2012).

### The Third Circuit’s Test

The Third Circuit has declined to join “either camp in the circuit disagreement,” setting forth instead a multi-factor balancing test to determine if an issue class should be certified. *Gates v. Rohm and Haas Co.*, 655 F.3d 255, 273 (3d Cir. 2011) (declining to certify issue class). The Third Circuit has described the *Gates* test as “analytically independent from the predominance inquiry under Rule 23(b)(3),” but the same concerns may be relevant to both. *Gonzalez v. Owens Corning*, 885 F.3d 186, 202 (3d Cir. 2018).

In *Gonzalez*, the Third Circuit affirmed the denial of issue class certification, holding that “[u]nlike a situation in which a Rule 23(c)(4) class might be appropriate because liability is capable of classwide treatment but damages are not, plaintiffs offer no theories of liability for which classwide treatment is

apt.” The Third Circuit agreed with the district court that lack of proof by common evidence was relevant to both the 23(b)(3) predominance inquiry and 23(c)(4) issue class determination, concluding that “a Rule 23(c)(4) class would not materially advance resolution of the underlying claims any more than would a class under Rule 23(b)(3).”

Uncertainty in Certain Jurisdictions

The remaining circuit courts’ views are uncertain. The Tenth Circuit has suggested the possibility of certifying a liability class “in the face of individualized damages,” *Wallace B. Roderick Revocable Living Tr. v. XTO Energy, Inc.*, 725 F.3d 1213, 1220 (10th Cir. 2013), and district courts in the First, Fourth and Tenth Circuits have adopted the broad view. See *In re: Prograf Antitrust Litig.*, 2014 BL 427982, at \*6 (D. Mass. June 10, 2014 (approving certification “on the issue of antitrust violation”); *Naparala v. Pella Corp.*, 2016 BL 177251, at \*10-19 (D.S.C. June 3, 2016) (adopting broad view but declining to certify issue class because it would not advance litigation); *Stender v. Archstone-Smith Operating Tr., L.L.C.*, 2015 BL 314666, at \*14 (D. Colo. Sep. 28, 2015) (“certify[ing] as to the question of liability only” even when “individual damages issues would surely overwhelm common issues (i.e., of liability)”).

District courts in the Eleventh Circuit, on the other hand, have espoused a view of Rule 23(c)(4) akin to, if not tougher than, *Castano*. In *O’Neill v. Home Depot U.S.A., Inc.*, the Southern District of Florida held that courts cannot use Rule 23(c)(4) to “certify a single issue when the case as a whole fails to meet the requirements of Rule 23” that common issues predominate over individual ones. 243 F.R.D. 469, 481-82 (S.D. Fla. 2006) (denying certification). Likewise, in *Fisher v. Ciba Specialty Chems. Corp.*, the Southern District of Alabama denied issue class certification, concluding that “the proper interplay between Rules 23(b)(3) and 23(c)(4) is that a class action as a whole must satisfy the Rule 23(b)(3) predominance requirement” before “Rule 23(c)(4) may apply as simply ‘a housekeeping rule that allows courts to sever the common issues for a class trial.’” 238 F.R.D. 273, 316 (S.D. Ala. 2006).

No Supreme Court View

The Supreme Court most recently refused to entertain the circuit split in *Martin* in 2019, after previously denying certiorari in *McReynolds*. Defendants in *Martin* argued, among other things, that the question presented is “a recurring one of substantial legal and practical importance,” particularly following *Comcast*, and “cleanly presents the Court with a long-overdue opportunity to address a fundamental issue of class action procedure.”

**Arguments Against Issue Class Certification**

Even in circuits that have adopted the broad view, courts frequently deny certification of an issue class where they find doing so would not otherwise serve the purposes of Rule 23. Commonly-articulated rationales for declining to certify an issue class include the following.

No Predominance Within the Proposed Issue

In *McDaniel v. Qwest Commc’ns Corp.*, the Northern District of Illinois rejected issue class certification where plaintiffs failed to establish that common questions predominated within the six liability-focused issues proposed for certification. 2006 BL 62766, at \*17 (N.D. Ill. May 23, 2006).

### The Case Would Not Be More Manageable

Several courts have stressed that issue class certification must materially advance the whole litigation—that is, make it more manageable and have a workable trial plan.

In *Rahman v. Mott's LLP*, for example, the Ninth Circuit affirmed denial of issue class certification because plaintiff had failed to show that certification “would be more efficient or desirable” and was “vague as to whether he intends to later certify a damages class, allow class members to individually pursue damages, or ha[d] some other undisclosed plan for resolving th[e] case.” 693 F. App'x 578, 580 (9th Cir. July 5, 2017). A California district court similarly rejected issue class certification in *In re Paxil Litig.* because plaintiffs failed to demonstrate a manageable trial plan that would make a class action lawsuit feasible. 212 F.R.D. 539, 546-48 (C.D. Cal. 2003).

Similarly, in *In re Amla Litig.*, the Southern District of New York rejected issue class certification, finding “the marginal efficiency gains from this proposed class” would be minimal due to the individual issues of comparative negligence, proximate cause, and damages that would remain to be tried. 282 F. Supp. 3d 751, 765-66 (S.D.N.Y. 2017). And in *Packard v. City of N.Y.*, the Southern District of New York likewise denied certification of issues pertaining to the city's purported liability for failure to train the New York Police Department, holding that the affirmative defense of probable cause required “such an intensive, individualized inquiry” that “the proposed certification fails to meaningfully further efficient issue resolution” of the case. 2020 BL 114874, at \*4 (S.D.N.Y. Mar. 25, 2020).

### No Classwide Model for Damages

In *D.C. v. Cty. of San Diego*, the Ninth Circuit affirmed denial of issue class certification, noting that plaintiffs must “carry their burden of showing damages are capable of efficient calculation.” 783 F. App'x 766, 767 (9th Cir. Nov. 5, 2019). The lower court highlighted that “[c]ourts often decline to certify a liability class where plaintiffs fail to show any model for calculating damages that (1) can be applied classwide (even if the model will be used to make individualized determinations) and (2) is tied specifically to the plaintiffs' theory of liability.” *D.C. v. Cty. of San Diego*, 2018 BL 36682, at \*3 (S.D. Cal. Feb. 2, 2018) (internal quotations omitted).

### Seventh Amendment Concern

The Seventh Amendment concern is commonly discussed as a reason to deny issue class certification. In *In re Amla Litig.*, for example, the Second Circuit denied certification because “later juries will have to decide comparative negligence and proximate causation, both of which overlap with the issue of defendant's negligence,” which plaintiffs proposed certifying as an issue. 282 F. Supp. at 765. Similarly, in *In re GMC Dex-Cool Prods. Liab. Litig.*, the Southern District of Illinois rejected certifying the issue of whether defendant's representations constituted an express warranty, reserving reliance for individual trials. 241 F.R.D. 305, 322-23 (S.D. Ill. 2007). Even if it were possible to separate reliance, the court held “there is little doubt” that doing so would violate defendant's Seventh Amendment rights.

### **Considerations for a Defensive Shift**

Given the broad view adopted in many jurisdictions, plaintiffs are likely to increasingly seek issue class certification. As a result, the focus at the class certification stage may shift to liability issues plaintiffs seek to certify, rather than the highly individualized issues defendants tend to focus on in opposition, such as causation, reliance, injury, and damages. Defendants may wish to consider the following:

*Assess Possibility of Issue Class from the Outset*

Starting with the complaint, consider that plaintiffs may seek to certify an issue class and assess how they may seek to do so.

*Focus on Implicit Requirements and Rule 23(a) Prerequisites*

Defendants can focus on Rule 23(a) and the ways plaintiffs may not have met the threshold requirements to proceed as a class. Defendants can also focus on the definition of the class and criteria used to identify class members to argue that plaintiffs have failed to establish that the class definition is adequate and a class can be ascertained.

*Develop Record on Lack of Common Questions Within Issue Itself*

Defendants should aim to demonstrate that individualized questions predominate within any liability issue that plaintiffs may seek to certify. Even courts that have adopted the broad view deny certification when common questions do not predominate within the issue itself or the proposed liability issue is not susceptible to proof through common evidence.

*Establish that Issue Class Certification Will Not Materially Advance the Litigation*

Defendants should craft the best arguments as to why issue class certification would not materially advance the litigation. Even courts that have taken the broad view deny issue class certification where numerous individualized issues remain for trial.

*Oppose Plaintiffs' Trial Plan*

Defendants can focus on weaknesses in plaintiffs' proposed trial plan and argue that plaintiffs have failed to offer a manageable strategy. Courts assessing issue class certification look closely at whether plaintiffs' plan for a path forward is efficient and workable.

*Critique Plaintiffs' Damages Model*

Defendants can argue against efforts to defer or delay the question of how damages will be adjudicated until after a liability issue is tried. Courts frequently deny issue certification where plaintiffs have failed to offer a damages model that is tied to their theory of liability and can be applied class-wide (even if applied to make individualized determinations).

*Identify and Raise Seventh Amendment Concerns*

Defendants should highlight any potential Seventh Amendment concerns. Defendants should carefully consider potential affirmative defenses that would either require reexamination of evidence or that would generate individualized inquiry substantial enough to overwhelm common issues.

*Highlight Inseparability of Common and Individual Issues*

In addition to focusing on why issue class certification does nothing to further principles of judicial economy and risks reexamination of evidence, defendants can emphasize that plaintiffs' claims are complex, and common issues are not easily separated from individual issues. Push for Narrow View of Rule 23(c)(4) in Undecided Jurisdictions

Where there is no binding precedent, defendants should urge adoption of the narrow view.

Although courts adopting the broad view have granted issue class certification only in limited cases, the rise in the invocation of Rule 23(c)(4) raises legitimate concerns about how it may be interpreted and applied. The defense of class actions should be performed with this in mind.

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