

## Third Circuit's Guidance on 'Issue Class' Takes a Holistic View on Rule 23 Requirements



**The court's recent decision in 'Russell v. Educ. Comm'n for Foreign Med. Graduates' confirms that even an 'issue class' cannot be certified without assuring that all the requirements of Rule 23 have been met.**

**By David E. Sellinger and Ariel Brown | Dec. 8, 2021 | New Jersey Law Journal**

The Third Circuit recently clarified the standard for certifying an “issue class” in *Russell v. Educ. Comm’n for Foreign Med. Graduates*, 20-2128 (3d Cir. Sep. 24, 2021), providing “clear guidance,” which was previously lacking in this Circuit, on necessary steps for certification under Rule 23(c)(4). While the decision permits certification of an “issue class” without satisfying the predominance requirement of Rule 23(b)(3) for the case as a whole, the decision confirms that even an “issue class” cannot be certified without assuring that all the requirements of Rule 23 have been met.

*Russell* was a case brought by a putative class of patients of a foreign-educated doctor against the Educational Commission for Foreign Medical Graduates (“the Commission”)—the primary body for certifying graduates from foreign medical schools for acceptance into medical-residency programs in the United States—for negligent infliction of emotional distress. The Commission certified the application of a man who was using a false identity and, after being certified, had gained acceptance into a U.S. residency program and gone on to practice at a hospital in Maryland, before law enforcement discovered he had used fraudulent immigration documents and medical transcripts. The Commission then invalidated his certification, and his medical license was revoked.

The District Court for the Eastern District of Pennsylvania certified an issue class under Rule 23(c)(4) on the issues of whether the Commission owed and breached a duty, for purposes of the plaintiffs' negligent infliction claim. The Third Circuit panel vacated that decision, holding that the District Court had failed to follow the necessary steps for certification of an "issue class," and remanded for further proceedings. The panel held that in order to certify a class under Rule 23(c)(4), the District Court must first determine whether the requirements of Rule 23(a) have been met and that the issue sought to be certified satisfies one of the subsections of Rule 23(b), and then must consider the so-called *Gates* factors announced in *Gates v. Rohm & Haas Co.*, 655 F.3d 255 (3d Cir. 2011).

Rule 23(c)(4) provides that "an action may be brought ... as a class action with respect to particular issues." In *Gates*, the Third Circuit adopted a "non-exclusive list of factors [to] guide courts" in deciding whether certification is "appropriate" in a particular case. The *Russell* court was faced with the question of whether a class was correctly certified on particular claim elements (there, the claim elements of duty and breach), where the District Court had not certified on the elements of causation, injury, and damages, nor had it certified issues as to the defendant's defenses.

The panel's decision pointed out that *Gates* left open the questions whether the term "particular issues" in Rule 23(c)(4) could include claim elements, and whether certifiable issues were limited to questions that establish liability. Picking up where the Third Circuit's prior jurisprudence left off, the panel held that the issue being certified need not resolve the matter of the defendant's liability "provided that such certification substantially facilitates the resolution of the civil dispute, preserves the parties' procedural and substantive rights and responsibilities, and respects the constitutional and statutory rights of all class member and defendants."

Consistent with that approach, the panel held that a district court must make three determinations in order to certify an "issue class": (1) Does the proposed issue class satisfy Rule 23(a)'s requirements? (2) Does the proposed issue class fit within one of Rule 23(b)'s categories? (3) If the proposed issue class does both those things, is it "appropriate" to certify that issue for class treatment? Applying that analysis, the panel concluded that the District Court abused its discretion in failing to determine whether the duty and breach elements of the plaintiffs' claim satisfied Rule 23(b)(3), and in failing to "rigorously consider" several *Gates* factors.

Reaffirming that a plaintiff must satisfy the requirements of Rule 23(a) and (b) and meet the *Gates* "appropriateness" test before seeking to certify a particular issue under Rule 23(c)(4), the *Russell* panel analyzed how issue-class certification would play out in further litigation of the case.

With respect to Rule 23(b), the panel held that while plaintiffs do not need to establish that their claim "as a whole" satisfies Rule 23(b), they do need to establish that the issue they seek to certify satisfies one of the subsections of Rule 23(b). Thus, in the typical class action for damages in which plaintiffs seek class certification under Rule 23(b)(3), which requires predominance, it is enough that plaintiffs show predominance as to the issue they are trying to certify. In this regard, *Russell* brings the Third Circuit in line with the majority of the circuits, which take the "broad view" that an issue class can be certified under Rule 23(c)(4), even if full certification cannot be satisfied as to the entire cause of action. In contrast, the Fifth Circuit, which has been an outlier on Rule 23(c)(4) certification, has taken the "narrow view" (although the strength of that "narrow view" has been reduced), under which issue-class certification is not permitted unless Rule 23(b)(3) predominance is satisfied as to the entire cause of action.

In *Gates*, the Third Circuit laid out nine factors to be considered in deciding whether, in a case in which an issue class "can" be certified under Rule 23(c)(4), certification is "appropriate." Those factors include, among others: the type of claims and issues in question; any potential efficiencies to be gained by granting

partial certification; the underlying law regarding the claims; the impact partial certification will have on the constitutional and statutory rights of class members and defendants; how certification of the issue class would advance resolution of the remaining issues; and whether findings and evidence from the common-issues phase will need to be reexamined by subsequent triers of fact.

The *Russell* panel looked at those factors in analyzing how issue-class certification would transpire in the further litigation of the case. The panel focused on the District Court's failure to expressly discuss the effect that issue-class certification would have on the effectiveness and fairness of the remaining issues. The opinion recognized that if a jury were to find that the Commission owed and breached a duty, that might create "undue pressure" on the defendant to settle even if the breach didn't cause the plaintiffs' harm. The panel also assessed the District Court's failure to "rigorously" consider the efficiencies to be gained by resolution of the certified issues and the suitability of the specific legal claim elements on which certification was proposed for class treatment.

In its amicus brief, the U.S. Chamber of Commerce argued that the District Court's decision, unless reversed, would result in a "flood of abusive class actions." The panel's decision recognized that concern, but found it to be "overblown." The opinion pointed out that while a plaintiff's lawyer might feel his case enhanced by an issue-class certification, the lawyer would still face the prospect of individualized proceedings on remaining key issues that are not certified (causation and damages were two such issues there), and that that could work to a defendant's advantage. In short, in establishing its framework for certification of an issue class, the decision isn't necessarily a game-changer that tilts the field in plaintiffs' favor.

Just as *Russell* explains what plaintiffs' counsel must be thinking about in seeking certification of an issue class, the opinion provides a template for how to successfully oppose Rule 23(c)(4) certification in the Third Circuit. The potential grounds include the following: Defense practitioners opposing issue-class certification will want to address the infirmities of a proposed issue-class certification under Rule 23(a) and, as it applies to the issues sought to be certified, Rule 23(b). They will also want to show in practical terms how Rule 23(c)(4) certification will not substantially facilitate the ultimate resolution of the case as a whole. They should emphasize, where warranted, why the issues proposed for class certification are unsuitable for issue-class treatment. If applicable, they also should explain how issue-class certification will make the resolution of the remaining issues in the case unfair to the defendant. Additionally, as issue-class certification contemplates common issues being tried first, followed by individual trials on individual issues such as causation and damages, defense practitioners will want to explain how each individual jury will need to reexamine the evidence and findings from the resolution of the common issues by the issue-class jury, thus rendering Rule 23(c)(4) certification inefficient.

In short, there's plenty in the *Russell* decision for both sides to consider.

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