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BLOG

Rule 23(c)(4), Issue Certification, and Circuit Splits Throughout 2023

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Key Takeaway: The Supreme Court has not directly ruled on whether issue certification pursuant to Rule 23(c)(4) should be applied as stringently as the Rule 23(b)(3) predominance requirement for class actions. Currently, there is a split among the circuits, which makes issue certification appear more attainable in some circuits than others. Recent cases denying Rule 23(b)(3) class certification reinforce the motivation for putative classes to consider issue certification.

Since individual facts relating to an issue can create a predominance hurdle for Rule 23(b)(3) certification, there is motivation for putative classes to seek certification under Rule 23(c)(4) for issue certification. Using this approach could theoretically assist some prospective classes in circumventing the strict predominance requirement.[1] With Rule 23(c)(4) issue certification, "[t]ypically, the [Rule 23] (c)(4) trial will determine common issues relating to the conduct of the defendant…issues that are identical for all class members…[I]t will leave questions regarding individualized relief—including eligibility for relief and calculation of damages—for future proceedings.[2]" The Second,[3] Fourth,[4] Sixth,[5] Seventh,[6] and Ninth[7] circuits have adopted a laxer view of certification under Rule 23(c)(4), in relation to the predominance requirement. These circuits would be more likely to certify an "issue" class that had not met the predominance requirement. The Fifth Circuit adopted a stricter view of Rule 23(c)(4).[8] As a result, the Fifth Circuit, and the Eleventh Circuit, which also adopted the more stringent view,[9] would still require predominance to be met before certifying a class.[10] Putative classes seeking issue certification may also consider how, in recent years, federal courts have been less likely to permit class certifications.[11] While courts' interpretations of the predominance requirement is not the only reason for this trend, comparatively low class certification rates may also influence putative classes in the Second, Fourth, Sixth, Seventh, and Ninth circuits to attempt class certification through issue certification.

Further proof that the predominance prong is often the Achilles heel of Rule 23(b)(3) certification was recently displayed in the Fifth Circuit's decision in *Elson v. Black* (Jan. 5, 2023).[12] Here, the court identified two reasons why predominance was not established by the presumptive class. To begin with, the proposed representatives consisted of fourteen women suing under the laws of seven states,[13] leading the court to observe that "different state laws govern different Plaintiffs' claims.[14]" The court further explained that "[t]he second reason Plaintiffs cannot establish predominance is that Plaintiffs' allegations introduce numerous factual differences that in no way comprise a coherent class.[15]"

Relatedly, in 2019, SCOTUS denied a writ of certiorari for a case which directly addressed the question [16] of whether Rule 23(c)(4) issue certification should be viewed stringently,[17] thus leaving the present circuit splits on this question unresolved. However, until SCOTUS issues a decision on this question, the hurdle presented by the predominance prong under Rule 23(b)(3) may lead putative classes to increasingly consider attempting class certification through Rule 23(c)(4) issue certification. As a result, when defending against Rule 23(b)(3) certification, defendants should be careful to avoid stipulations or other traps that could be conducive to issue certification.

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[1] Mark A. Perry, *Issue Certification under Rule 23(c)(4): A Reappraisal*, 62 DePaul L. Rev. 733 (2013).

[2] Myriam Gilles & Gary Friedman, *The Issue Class Revolution*, 101 Boston University L. Rev. 133 (2021).

[3] *Augustin v. Jablonsky (In re Nassau County Strip Search Cases), 461 F.3d 219, 231 (2d Cir. 2006).*

[4] *Gunnells v. Healthplan Servs.*, 348 F.3d 417, 468 (4th Cir. 2003).

[5] *Martin v. Behr Dayton Thermal Prods. LLC, 896 F.3d 405, 417 (6th Cir. 2018).*

[6] *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 492 (7th Cir. 2012).*

[7] *Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1235 (9th Cir. 1996).*

[8] *Castano v. American Tobacco Co.*, 84 F.3d 734, 752 (5th Cir. 1996).

[9] *Sacred Heart Health Sys. v. Humana Military Healthcare Servs.*, 601 F.3d 1159, 1185 (11th Cir. 2010).

[10] *Id.*

[11] Robert H. Klonoff, *The Decline of Class Actions*, 90 Wash U. L. Rev. 729 (2013). https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=6004&context=law_lawreview

[12] *Elson v. Black*, 56 F.4th 1002, 1010 (5th Cir. 2023).

[13] *Id.*

[14] *Id.* at 1004.

[15] *Id.* at 1007.

[16] *Behr Dayton Thermal Prods. LLC v. Martin*, 2019 U.S. LEXIS 1959 (U.S., Mar. 18, 2019).

[17] *Behr* was from the Sixth Circuit Court of Appeals.

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Author

Sarah E. Harmon

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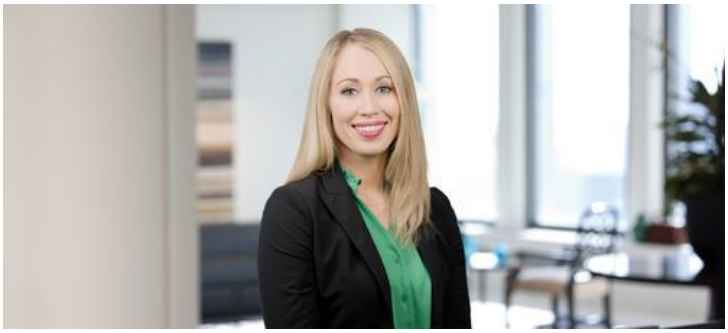

Sarah E. Harmon

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