

DC Circ. Ruling Puts Issue Class Cert. Under Microscope

By **John Beisner, Geoffrey Wyatt and Asher Trangle** (August 17, 2023, 4:56 PM EDT)

Last month in *Harris v. Medical Transportation Management Inc.*,^[1] the U.S. Court of Appeals for the D.C. Circuit **weighed in** on the long-standing debate over the appropriate use of issue classes under Federal Rule of Civil Procedure 23(c)(4).

Where it is apparent that significant individualized issues are lurking in a proposed class, it is not uncommon for plaintiffs counsel to ask for certification of an issue class — i.e., a class where one or fewer than all issues are certified for class treatment and remaining issues are subsequently individually adjudicated, at least in the alternative to plenary class treatment — and thereby create an end-run around the predominance requirement of Rule 23(b)(3).

While early decisions were hostile to issue classes,^[2] appellate courts in some circuits have taken a more solicitous approach in recent years.^[3] In *Harris*, however, the D.C. Circuit pushed back against lax application of the rule, admonishing the U.S. District Court for the District of Columbia for certifying an issue class without adequately analyzing whether the proposed class would also meet the Rule 23(a) and (b) requirements.

In particular, the court cautioned that the plaintiffs "cannot effectively skirt the functional demands of the predominance requirement by seeking certification of an overly narrow class and then arguing that the issue (inevitably) predominates as to itself."

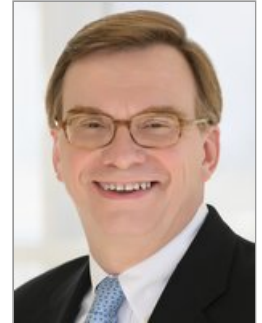
This edict echoes the approach taken by the U.S. Court of Appeals for the Fifth Circuit in cases like *Castano v. American Tobacco Co.* in 1996.

It suggests a conception of the issue-class provision as a case management tool, not a means by which the predominance requirement can be watered down in order to facilitate class certification despite the overwhelming presence of individualized issues, a construction that could influence other courts going forward.

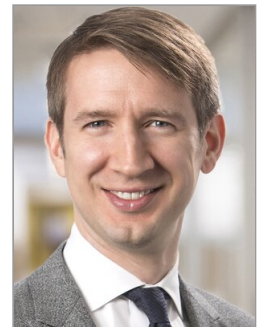
In *Harris*, medical transportation drivers brought a putative class action against their employer, alleging that the defendant failed to pay full wages in contravention of both federal and Washington, D.C., law. The district court declined to certify "a class of approximately 800 drivers ... on the grounds that Plaintiffs had failed to meet the predominance requirements of Rule 23(b)(3)."^[4]

Nevertheless, the court allowed plaintiffs another bite at the apple by leaving open the possibility of certifying an issue class under Rule 23(c)(4).

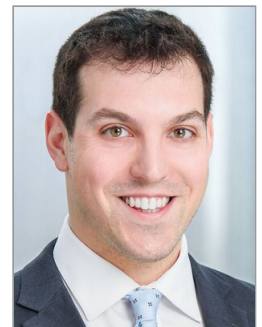
Following supplemental briefing, the lower court certified an issue class under Rule 23(c)(4) to resolve two disputed questions but left unanswered the defendant's overall liability. The district court "observed that Rule 23(c)(4) is not without controversy."



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It acknowledged the narrow approach to issue classes taken by Castano and another judge of the U.S. District Court for the District of Columbia, but it rejected these cases. It thought the better approach was to read the rule as authorizing the court to consider the question of predominance after "identifying issues suitable for class treatment."

Based on this understanding of Rule 23(c)(4), the district court certified two issues for class treatment: whether the defendant qualified as a joint employer of the putative class members, and whether the defendant was a general contractor that is strictly liable for any violations of the wage laws committed by its subcontractors.

The D.C. Circuit granted interlocutory review under Rule 23(f) and remanded the case for further consideration, rejecting much of the lower court's analysis.

First, the panel explained that Rule 23(c)(4) falls into a category of "permissive" tools that relate to the "district court's management of class litigation." According to this view, the role of the issue class is to facilitate and assist the court in managing the case rather than to grant courts the authority to craft new classes outside the structure and purpose of the Rule 23(b) archetypes.

With this understanding, the panel readily concluded that the "district court abused its discretion by certifying the issue class under Rule 23(c)(4) without first determining that Rule 23's requirements for class certification were met as to the issue class."

Rule 23(c)(4) does not create a fourth category of class actions beyond those in 23(b), and as a result, "any 'issue class' under Rule 23(c)(4) must also meet the threshold requirements of Rule 23(a) and be maintainable under one of the class action types laid out in Rule 23(b)."

It emphasized that satisfying each 23(a) and (b) subcomponent is a "fundamental prerequisite to the existence of a class action," and made clear that Rule 23(c)(4) "does not give the district court a pass on those preconditions."

The court then reviewed the district court's application of the Rule 23 requirements. It agreed that the Rule 23(a) requirements of numerosity, commonality, adequacy and typicality were satisfied, but it disagreed with the district court's treatment of Rule 23(b). There it found fault with the district court's approach of declining to consider predominance until after determining an issue could be certified for class resolution.

The court then offered guidance for addressing the Rule 23(b)(3) requirement on remand. It explained that issue classes may be used for adjudicating less than an entire cause of action, but district courts "must heed Rule 23's carefully calibrated limits on class certification" and "ensure that Rule 23(c)(4)'s authorization of issue classes does not end up at war with Rule 23(b)(3)'s predominance requirement."

This means that plaintiffs cannot skirt the demands of predominance by artificially narrowing the issue to a single, unimportant question; there must be a showing of something more than just "a single common question that predominates as to itself."

Relatedly, consideration must be given to the superiority requirement of Rule 23(b)(3), meaning that the court must address whether breaking off isolated issues for consideration on a class basis will truly promote efficient adjudication. Without these important restrictions on its use, the issue-class provision will be unlikely to advance the goals of the class action mechanism or lead to classwide resolution of any meaningful kind.[5]

The Harris decision places important limitations on the use of issue classes, though it might leave room to argue for broader application of the rule than Castano envisioned.

It acknowledged that issue classes might be appropriate in some instances where plenary class treatment might not be. But it also made clear that district courts must take predominance and superiority seriously before liberally certifying isolated issues for class treatment.

Specifically, a "district court must explain how, within the context of the particular litigation before it, common questions predominate within a reasonably and workably segregable component of the

litigation," as well as "address how dividing the litigation through the creation of an issue class protects all parties' interests in the full presentation of their claims and evidence."

These required showings are facially more demanding than those that have been embraced in other rulings affirming issue classes that address only peripheral matters in the case.[6]

This standard seems likely to make it more difficult to certify issue classes on narrow or collateral matters, with the potential to improve efficiency and reduce costs of class litigation.

When narrow issue classes are certified, there will be a need for individual trials on subsequent questions dealing with one or, more likely, multiple key disputed areas. Such certification compels counsel for all sides to commit time, effort and resources on litigation that, when concluded, might not resolve anything.

At the same time, it is likely to facilitate resolution by settlement because of the limited information it yields about the strengths and weaknesses of the claims and defenses at issue in the case.

Beyond efficiency concerns, lax use of issue class certification to try to narrow issues can unfairly prejudice defendants by contorting the proceedings to the point that the finder of fact is asked to consider issues out of context, and particularly without the benefit of important defense evidence on other issues that would be admissible in a plenary trial.

Harris alluded to this feature of improper issue classes by noting that it was important to guard against "unreasonably fractured litigation" that undermines the interest in ensuring that "evidence can fairly and sensibly be presented in a way that protects the parties' competing interests."

Given these legitimate concerns over both inefficiencies and unfairness inherent in the broad approach to issue classes, the Harris decision offers important guidance on issue classes and the proper limitations on their use.

Because Harris does not expressly disagree with the approach taken by other circuits that have applied Rule 23(c)(4) most expansively, its reasoning provides potentially persuasive fodder for seeking to limit the scope of issue classes in those other forums.

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[1] No. 22-7033, 2023 WL 4567258 (D.C. Cir. July 18, 2023),

[2] See, e.g., [Castano v. Am. Tobacco Co.](#), 84 F.3d 734, 745 n.21 (5th Cir. 1996) ("A district court cannot manufacture predominance through the nimble use of subdivision (c)(4)").

[3] See Unfair, Inefficient, Unpredictable U.S. Chamber of Commerce Institute of Legal Reform, at 42 ("More recently, however, certain courts have adopted a laxer attitude toward certification under Rule 23(c)(4)."); see also John H. Beisner, Jessica D. Miller and Nina R. Rose, Glazer: A Big Defense Victory, but Everyone Lost, Feb. 5, 2015, <https://www.jdsupra.com/legalnews/glazer-a-big-defense-victory-but-ever-44860/> (discussing implications of a defense verdict in a class trial for the future of issues classes); Jessica D. Miller and Geoffrey M. Wyatt, Taking Issue with Issues Classes Post-Comcast, Law360, Mar. 31, 2014, <https://www.law360.com/articles/522088/taking-issue-with-issues-classes-post-comcast> (noting two "well-publicized" appellate decisions "essentially relied on issues-class approach to skirt the implication of Comcast for class actions").

[4] See [Harris v. Med. Transportation Mgmt., Inc.](#), No. 17-CV-01371 (APM), 2021 WL 3472381, at *1 (D.D.C. Aug. 6, 2021).

[5] Of note, the decision also addressed the issue of pendent appellate jurisdiction in Rule 23(f) appeals. Few courts have allowed free-ranging consideration of ancillary or subsidiary issues after granting review over class certification decisions under Rule 23(f). In *Harris*, the Court declined to consider the issue of FLSA collective action certification pursuant to pendent appellate jurisdiction for three reasons: (1) collective actions differ materially from Rule 23 class actions; (2) the Court would have to weigh in on a Circuit split regarding what "similarly situated" means for FLSA collective actions; and (3) the lower court itself declined to certify for interlocutory appeal the FLSA question.

[6] See, e.g., *Martin v. Behr Dayton Thermal Prod. LLC* , 896 F.3d 405, 416 (6th Cir. 2018) (affirming certification of seven different issues which all failed to answer critical question of intrusion onto class members' properties).