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The Class Action Chronicle

Fourth Circuit Holds That Class Action Waiver Issue Must Be Decided Before Certification and Questions Narrow Issue Classes

In *In re Marriott International, Inc.*, 78 F.4th 677 (4th Cir. 2023), a panel of the U.S. Court of Appeals for the Fourth Circuit, in an opinion by Judge Pamela Harris, unanimously vacated certification of a class in multidistrict litigation over a data breach, holding that lower courts ***must*** consider class action waivers prior to certifying a Rule 23 class.

Where there is good reason to suspect all or nearly all class members were subject to contracts in which they waived their right to participate in a class action, failure to consider the impact of waivers until after certification would lead to needless pretrial litigation and defeat the entire purpose of the bargained-for waiver, the court held. In doing so, it made clear that this inquiry is separate and distinct from the question of predominance, offering defendants another avenue to defend against class certification where appropriate.

In addition to addressing the waiver issue, the *Marriott* court also considered the controversial use of Rule 23(c)(4) to certify narrow or element-specific classes — commonly referred to as "issues" class actions. As our team recently discussed, earlier this year, the D.C. Circuit vacated certification of issues classes where the lower court effectively construed Rule 23(c)(4) as obviating the need to independently satisfy the requirements of predominance and superiority. *Harris v. Med. Transp., Inc.*, 77 F.4th 746 (D.C. Cir. 2023)

Similarly, the *Marriott* ruling casts doubt on the propriety of certifying excessively narrow questions for class treatment that essentially paper over superiority concerns. This pair of rulings suggests that appellate courts may be scrutinizing more closely district court rulings that employ issues classes to skirt the requirements of Rule 23(b).

Both parts of the *Marriott* court's opinion highlight important tools for defending against class certification in certain cases.

District Court Proceedings

In November 2018, Marriott was the target of a data breach, which resulted in hundreds of millions of consumers' personal information being compromised. A putative class of customers affected by the breach brought suit against both Marriott and Accenture, the third-party contractor responsible for maintaining data security for the compromised database.

The crux of the complaint was an allegation that the defendants failed to take reasonable steps to protect the plaintiffs' personal information. The plaintiffs sought to certify 13 damages classes and subclasses broken down by geography and theory of recovery (breach of contract, consumer protection or negligence), in addition to multiple liability issues classes under Rule 23(c)(4).

The district court first narrowed the class definition to two categories:

- "Persons who bore the economic burden" for stays at Marriott properties.
- Starwood Preferred Guest (SPG) members.

It said this was necessary to avoid standing and typicality concerns, respectively.

Ultimately, it certified:

- Damages classes for contract and consumer-protection claims only (rejecting the classwide damages theory underlying the proposed negligence class in a *Daubert* ruling the same day).
- Issues classes on the duty and breach elements of the negligence-based claims under Rule 23(c)(4).

The Appeal

On interlocutory appeal, the defendants challenged nearly every aspect of the district court's certification ruling. The Fourth Circuit focused on two key aspects of the underlying decision.

Class action waiver. First, the panel agreed with Marriott that the lower court erred by declining to consider, "*before* certifying class actions against Marriott, the import of a purported class-action waiver signed by every putative class member." 78 F.4th at 685.

The circuit court acknowledged that narrowing the class definition to only SPG members would obviate typicality concerns and ensure that multiple issues would be common to the class. But the revision of the class definition to comprise ***only*** individuals possibly subject to an identical agreement where they forfeited their right to proceed as a class is precisely why the district court needed to resolve the enforceability of that agreement as a threshold issue. The district court's mistake was failing to recognize the import of this implication.

Recognizing that other courts had not squarely addressed the issue, the panel concluded that the enforceability of such a waiver must be resolved prior to deciding the certification question because a class action waiver would be rendered valueless if courts only considered its applicability ***after*** granting certification. As Judge Harris explained, "certification is the key moment in class-action litigation: It is the 'sharp line of demarcation' between 'an individual action seeking to become a class action and an actual class action.'" *Id.* at 686.

But the plaintiffs had allegedly foregone the right to collective procedural tools in exchange for a contractual benefit, which means the district court "simply cannot certify a class at the behest of plaintiffs who have promised to stay on the 'individual action' side" of the "sharp line" Judge Harris described. Id. at 687. Accordingly, the Fourth Circuit vacated the lower court's decision to certify the damages classes and left the merits of the waiver issue for the district court to address on remand.

Issue classes. Second, the court examined the remaining negligence issues classes against Accenture (which did not argue that it could enforce the class action waiver contained in the SPG agreement). Accenture raised multiple arguments on the Rule 23(c)(4) issue, including, *inter alia*, that issues classes may not encompass only some elements of a cause of action and, in any event, that the superiority requirement takes on a special, heightened role in the context of issues classes.

While the Fourth Circuit did not render a formal ruling on the propriety of using Rule 23(c)(4) to slice single causes of action into individualized elements and isolate some for class treatment, it questioned the district court's assumption that the practice was proper. The court recognized authority from other jurisdictions (and cited by the lower court) suggesting the case law may be "'coalesc[ing]'" around a 'broad view of Rule 23(c)(4)…,'" but it expressly noted "our court has yet to rule directly on this issue." *Id*. at 688-89. And it noted "the question is not entirely free from doubt." *Id*. at 689.

Assuming without deciding that certification of single issues for class treatment might sometimes be proper, the Fourth Circuit clarified that, "if courts certify classes on individual elements of a cause of action, Rule 23(b)(3)'s superiority requirement takes on special importance." *Id*. While the process of narrowing an issue to a single element makes it "virtually axiomatic that common issues will predominate," serious questions arise when courts "cleave[] off individualized questions of liability, as well as damages, for separate individual trials." *Id*. While they might lower the threshold for proving predominance, element-specific issue classes concomitantly "diminish[] the efficiency gains of the class proceedings." *Id*.

Another problem with narrow issues classes, it noted, is that the "incentive problem" normally resolved by class actions — the prospect of a recovery that justifies the expense of litigating low-value claims — remains a barrier because plaintiffs will have to finance follow-on proceedings for the remaining components of their case. *See id.*

The district court had recognized the potential efficiency issues inherent in trying issues classes, but it had concluded that those concerns were outweighed because the issues class could be tried in conjunction with the damages class it had certified. Because the Fourth Circuit vacated certification of the damages classes due to the class waiver issue, however, it concluded that the issues class certification likewise had to be vacated.

Takeaways

The *Marriott* ruling has a number of implications for future practice.

First, it highlights the role that class waivers can play prior to briefing on certification itself. Defendants commonly utilize waivers to demonstrate a lack of predominance when some or most class members are subject to agreements containing a waiver. But the success of this argument varies significantly by judge, jurisdiction and facts. *Compare Tan v. Grubhub, Inc*., No. 15-CV-05128-JSC, 2016 WL 4721439, at *5 (N.D. Cal. July 19, 2016) ("[B]ecause all but one of the unnamed class members are potentially bound by the class action waiver provisions, Lawson cannot satisfy the commonality requirement of Rule 23(a); he therefore also cannot satisfy the more stringent predominance requirement in Rule 23(b)(3)."), *aff'd sub nom. Lawson v. Grubhub, Inc*., 13 F.4th 908 (9th Cir. 2021) *with Cardenas v. Toyota Motor Corp*., No. 18-22798-CIV, 2021 WL 5811741, at *14 (S.D. Fla. Dec. 6, 2021) ("Defendants do not say how many class members have signed such agreements or why they are definitely applicable here. Until they do so, the Court declines to find that this possibility cuts against predominance.").

Marriott offers an alternative path to raise these issues. In particular, where defendants have strong reason to believe all or nearly all class members could potentially be subject to an agreement containing a waiver, *Marriott* suggests that the issue is a preliminary one that should be resolved at the threshold of the case. The success of this argument will likely vary based on the portion of class members who may be subject to agreements and how that fits with the class definition. However, obtaining an early ruling that a significant portion of the class cannot be part of a class action would significantly winnow the case, narrow the scope of pretrial discovery and limit the settlement value of the lawsuit.

Second, the *Marriott* decision echoes the same skepticism of issues classes offered by the D.C. Circuit in Harris earlier this year. Both rulings imply that a higher showing might be required to justify the use of issues classes. Where the proposed issue class is an exceedingly narrow question that "predominates as to itself," plaintiffs must offer evidence satisfying a heightened superiority requirement.

These rulings by two different appellate courts make clear that issues classes remain controversial and that courts are receptive to arguments against their routine use. And the *Marriott* decision stands out as an important reminder that the superiority requirement will be nearly impossible to satisfy where plaintiffs seek certification of exceedingly specific questions, or elements of a cause of action under Rule 23(c)(4).

Other Recent Class Action Decisions of Note

Fifth Circuit Holds That Pending Putative Class Action Does Not Bar Trial of Related Mass Tort Action

***In re Jefferson Parish,* 81 F.4th 403 (5th Cir. 2023).**

The U.S. Court of Appeals for the Fifth Circuit, in an opinion by Judge Jennifer Walker Elrod, held that the filing of a putative class action does not universally estop all separate but related actions from proceeding to the merits until the class-certification process is completed in the putative class action.

Defendants' *mandamus* action arose from two lawsuits alleging that a landfill was releasing noxious emissions into Louisiana neighborhoods: one a putative class action, the other a mass action. The unconsolidated actions sought damages from the same defendants for nuisance under different articles of the Louisiana Civil Code.

When the mass action was set for trial, defendants petitioned for *mandamus* relief to stop the trial until the district court ruled on class certification in the putative class action. Defendants argued that Rule 23 requires a district court to rule on class certification before reaching the merits in any related case because of the risk of "one-way intervention" — that is, allowing absent class members to join in on a plaintiff's victory without having to share in a defeat.

The appellate court denied defendants' petition, ruling that the filing of a putative class action in no way bars possible class members from reaching the merits of their own claims until class certification proceedings conclude. The court observed that petitioners could not identify a single case that interpreted Rule 23 in that manner.

The court also concluded that defendants' concerns were unfounded. In particular, defendants' arguments that allowing the mass action to proceed would result in one-way intervention was entirely without merit. While the court acknowledged that potential class members could learn about the strength of their case from the individual plaintiffs' trial, the court reasoned that defendants could also learn about any weaknesses of plaintiffs' claim, so the parties were similarly situated.

The defendants also raised the prospect of issue preclusion — *i.e.*, where an issue decided against a party precludes it from contesting the same issue in another case. However, the panel held that issue preclusion would not be a concern here, because Louisiana law does not recognize non-mutual collateral estoppel, which is the variant of issue preclusion asserted by a person who was not a party to the prior litigation.

Fifth Circuit Upholds Certification Where Lead Plaintiff Did Not Participate in Each Retirement Plan at Issue

***Chavez v. Plan Benefit Servs., Inc.*, 77 F.4th 370 (5th Cir. 2023).**

In an opinion written by Judge Carl Stewart, the U.S. Court of Appeals for the Fifth Circuit affirmed class certification in an ERISA case where the named plaintiffs sought to certify claims relating to multiple separate ERISA plans. Plaintiffs alleged that the defendants mismanaged various retirement plans by charging excessive fees. At issue was whether plaintiffs had standing to sue as to plans in which they did not participate, and whether the district court abused its discretion in its Rule 23 certification analysis.

First, the court addressed whether plaintiffs had standing to challenge fees in plans in which they never participated (including plans sponsored by employers for whom they never worked). The court observed an existing circuit split on whether class representatives can litigate harms allegedly suffered by other class members that the named plaintiffs themselves did not sustain.

As the Fifth Circuit described it, some courts will apply the "standing approach" — that is, the injury the plaintiff suffers ultimately defines the scope of the controversy she may litigate. In other words, whatever relief a plaintiff seeks must match up with the harm suffered. If the class representative has injuries that differ from other class members, then she lacks standing to pursue those claims.

Other courts utilize the "class certification approach," under which the standing inquiry is resolved once a court determines that the class representative has standing to pursue her ***own*** claims, the Fifth Circuit explained. The issue of whether the class representative can adequately represent the class is one to be tackled during class certification.

The Fifth Circuit opted not to weigh in on the split, as neither approach barred the plaintiffs before it from Rule 23 consideration. Under the class certification approach, the court held that the class representatives had standing to sue for their claims because they had demonstrated a redressable injury in fact traceable to defendants' conduct. And under the standing approach, the panel concluded that plaintiffs suffered the same loss as the unnamed class members and therefore had standing.

The court then held that the district court did not abuse its discretion in certifying the class under Rule 23(b)(1)(B). That provision permits certification where "prosecuting separate actions by or against individual class members would create a risk of … adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests."

The court concluded that the district court did not abuse its discretion by certifying a class under Rule 23(b)(1)(B) because, despite the existence of multiple plans, the defendants' fees were "uniform or amenable to a pricing grid," and allowing an individual action to proceed would therefore be improper because of the implications that the judgment in such a case would have for beneficiaries of other implicated plans. The Fifth Circuit also found certification supported by the fact that the plaintiffs sought declaratory relief and disgorgement of profits.

Nevertheless, acknowledging that the "Supreme Court has cautioned against certification under Rule 23(b)(1)(B)," the Fifth Circuit also affirmed the district court's decision to certify the plaintiffs' class under Rule 23(b)(3). Specifically, the court held that there were common questions of law and fact as to whether the defendants owed fiduciary duties to the class members by virtue of their role in managing the trusts.

Third Circuit Rules That Minor Revision to Certification Order Did Not Reopen Window for Appeal

Wolff v. Aetna Life Ins. Co., 77 F.4th 164 (3d Cir. 2023).

In an opinion for the U.S. Court of Appeals for the Third Circuit, Judge D. Brooks Smith held that a modified class certification order triggers a new 23(f) petition period only when the modified order materially alters the original order.

The plaintiff filed a putative class action, maintaining that her insurer was not entitled to recoup disability payments from a third-party settlement. The district court certified the class over the defendants' objections. Under Rule 23(f), the defendants had 14 days to petition for appellate review of the court's order granting class certification, but did not do so.

Nearly three months later, the defendants filed a motion to reconsider, contending that the district court had failed to perform a rigorous analysis. The district court disagreed, though it did reword the class definition to address a contention that it had certified a fail-safe class (*i.e.*, where a decision adverse to the plaintiff on the merits would mean that she was not part of the class, which would allow the absent class members to avoid a binding judgment).

Fourteen days after the district court issued its modified class certification order, and 195 days after the court's original class certification order, defendants filed a Rule 23(f) petition for immediate appeal. The Third Circuit held that the petition was untimely, because it was made well past the 14-day time limit. The court explained that a revision to a class certification order only opens a new 14-day window to petition for appeal where the revision materially changes the order. And here, the changes to the class definition were ultimately minor clarifications, rather than material alterations. Thus, the court denied the defendant's 23(f) petition to appeal.

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