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D.C. Circuit: issue class must still meet all Rule 23 requirements, including showing that resolution of the certified issues will enhance resolution of the entire litigation

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Takeaway: Class certification of damages claims frequently turns on whether individual issues predominate over common issues under Federal Rule 23(b)(3). Class plaintiffs facing predominance problems may attempt to circumvent those difficulties by seeking certification of "issue" classes under Rule 23(c)(4). The D.C. Circuit recently issued an important decision preventing the use of "tautological" issue classes strategically limited to narrow "common" issues that do not serve Rule 23's overarching purpose of materially advancing the entire litigation through the class device. *Harris v. Med. Transp. Mgmt., Inc.*, 77 F.4th 746 (D.C. Cir. 2023).

Non-emergency medical transportation drivers in *Harris* sued their alleged employer Medical Transportation Management, Inc. ("MTM"), asserting wage-related claims under federal and District of Columbia law. *Id.* at 752. After the district court refused to dismiss the drivers' statutory claims, it conditionally granted the drivers' motion for conditional certification of an FLSA collective action but denied class certification of the non-FLSA claims, finding the drivers had not shown that common issues predominated over individual issues. *Id.* at 754. The district court also denied the drivers' alternative motion to certify an issue class "without prejudice." *Id.*

After supplemental briefing, the district court granted in part certification of an issue class addressing only "(1) whether MTM is a joint employer of the putative class members; and (2) whether MTM is a general contractor under D.C. law, and thereby strictly liable for any wage law violations committed by its subcontractors." *Id.* at 755 (citation omitted). The D.C. Circuit granted interlocutory review under Rule 23(f), finding that "the question of under what conditions a Rule 23(c)(4) 'issue class' can be certified when no lawsuit or cause of action has been certified as a class is an 'unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally.'" *Id.* at 756 (citation omitted).

The Court of Appeals held 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." *Id.* at 757. To be certified, an "issue class" must "meet the threshold requirements of Rule 23(a) and be maintainable under one of the class action types laid out in Rule 23(b)" (specifically, Rule 23(b)(3) for damages classes). *Id.*

The D.C. Circuit first rejected the contention that, as a textual matter, a Rule 23(c)(4) class did not have to satisfy the other requirements of Rule 23: "Rule 23's text and structure offer no quarter to the view that Rule 23(c)(4) creates an independent type of class action that is freed from all of Rule 23's other class-

action prerequisites." *Id.* at 758-59. While the Court of Appeals agreed the certified issue class in *Harris* satisfied Rule 23(a), it reversed the district court's determination that the damages issue class could be certified under Rule 23(b)(3).

The appellate court explained that district courts "must ensure that the common questions within the certified issues predominate over any individual ones," including evaluating "the relationship any certified issues have as to the dispute as a whole." *Id.* at 760. Only when an issue class would "encompass a reasonably and workably segregable aspect of the litigation" should it be certified. *Id.* Examples include (1) "the determination of liability"; (2) "proof of a key element of a cause of action"; or (3) another issue that "if decided, would materially advance the fair resolution of the litigation." *id.* at 760-61. By way of illustration of the third category, an "affirmative defense" may be the subject of an issue class where the defense applies to "a large number but not all class members." *id.* at 761.

In evaluating certification of a proposed issue class for a damages claim, a district court must protect against the strategic use of issue classes to avoid Rule 23(b)(3)'s predominance requirement: "Plaintiffs cannot effectively skirt the functional demands of the predominance requirement by seeking certification of an overly narrow issue class and then arguing that the issue (inevitably) predominates as to itself." *Id.* at 762. To prevent predominance from becoming a "tautological inquiry," 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 opposed to addressing a "single common question that predominates as to itself." *Id.* Any such proposed issue class, moreover, must adequately protect "all parties' interests in the full presentation of their claims and evidence." *Id.*

District courts must also examine whether the issue class satisfies Rule 23(b)(3)'s separate "superiority requirement," which "ensures that class adjudication makes the litigation more manageable and promotes the prompt and efficient resolution of the case." *Id.* at 762-63. In the case before it, for example, the issues proposed to be resolved via issue classes might be better resolved by "deciding a partial summary judgment motion focused on the issues proposed to be certified—such as MTM's employer or general contractor status." *Id.* at 763.

Finally, the D.C. Circuit disagreed with the district court's indication that "notice is not required for an issue class under Rule 23(b)(3)," explaining that "all of the procedural protections" of Rule 23(b)(3) apply to damages issues classes. *Id.* at 763-64.

Thus, the Court of Appeals remanded the order certifying the issue class for further consideration consistent with the opinion. *Id.* at 767.