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Eighth Circuit rejects district court's certification at all costs approach in securities fraud case

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Takeaway: Sometimes it seems a district court is determined to certify a class at all costs. In *Ford v. TD Ameritrade Holding Corp.*, --- F.4th ----, No. 22-3232, 2024 WL 4021358 (8th Cir. Sep. 3, 2024), the district court granted class certification, notwithstanding the magistrate judge's recommendation that the motion be denied. An Eighth Circuit panel then reversed the district court's certification order on interlocutory appeal. Undeterred, the district court again certified a damages class under Rule 23(b)(3) and, for good measure, certified injunctive relief and issues classes under Rules 23(b)(2) and (c)(4). But the Eighth Circuit – in a second interlocutory appeal – again reversed the district court's certification order. The most recent *Ford* decision illustrates how individualized issues can defeat predominance notwithstanding different theories of economic loss in a securities fraud case.

Customers of TD Ameritrade can buy and sell stocks by placing orders through its online platform. It then routes orders to trading venues (such as the New York Stock Exchange) for execution, using a computerized routing system.

Roderick Ford was appointed as the lead plaintiff for a group of retail investors who traded securities through TD Ameritrade between 2011 and 2014. He alleged that the company's order-routing practices violated its "duty of best execution," which demands that brokers "use reasonable efforts to maximize the economic benefit to the client in each transaction." 2024 WL 4021358, at *1.

Alleging that the company routed trades through venues that paid it the most money, as opposed to venues that provided the best outcome to its customers, Ford asserted that TD Ameritrade violated Section 10(b) of the Securities Exchange Act of 1934 and the SEC's Rule 10b-5.

Ford moved for class certification. A magistrate judge recommended that the motion be denied, concluding that individualized issues predominated over common issues on the essential element of economic loss. But the district court nevertheless granted the certification motion, finding that Ford's expert witness had developed an algorithm that could automatically compute the economic loss for each customer. The Eighth Circuit accepted an interlocutory appeal of the certification order and reversed. Observing that "the economic loss allegedly caused by TD Ameritrade's order routing practices is 'the difference between the price at which [customers'] trades were executed and the "better" price allegedly available from an alternative trading source,'" the appellate court ruled that "individual questions of economic loss precluded a conclusion that common issues predominated." *Id*. at *1-2.

After remand to the district court, Ford again moved for class certification, asserting that "paying a commission to TD Ameritrade in exchange for brokerage services that were not provided constitutes an economic loss for the customer," and that common issues predominated because the "loss was suffered by every class member in a similar manner and in an amount that may be easily calculated from the number of trades executed by TD Ameritrade for each customer and the amount of commission paid."

Id. at *2.

The district court again certified a damages class under Federal Rule 23(b)(3), alternatively certifying an injunctive relief class under Rule 23(b)(2) and an issues class under Rule 23(c)(4).

Allowing a second interlocutory appeal, the Eighth Circuit reversed again. The panel rejected Ford's economic loss theory based on the payment of commissions, stating that "[a] commission is a flat rate that says nothing about the best price reasonably available under the circumstances at the time of a trade," and "[w]hether a flat-rate commission fee resulted in economic loss would still require analysis of individualized questions, such as the existence of alternative brokers, the commission fees of other brokers, and the prices that other brokers could have obtained for each trade." *Id*. at *3.

The panel then easily rejected the two alternative bases for certification approved the by district court. Certification of an injunctive class under Rule 23(b)(2) was improper, the panel ruled, for the same reason that predominance failed under Rule 23(b)(3), given that the "cohesiveness" requirement under Rule 23(b)(2) is more demanding that the predominance requirement. The issues class under Rule 23(c)(4) likewise failed, because resolution of the issue of whether TD Ameritrade violated the duty of best execution would still leave too many individualized issues to resolve and would not therefore "materially increase efficiency in this case." *Id*. at *4.