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SCOTUS declines to review Sixth Circuit decision affirming class "issue" certification

by C. Allen Garrett Jr.

Federal Rule 23(c)(4) allows class certification of "particular issues." The question of "issue" certification has divided the Courts of Appeals, with some courts taking a "narrow" view that issues cannot be certified unless the entire action satisfies Rule 23(b)(3)'s predominance standard, while others take a "broad" view that allows certification of certain issues even where significant injury, causation, and damages issues will require individualized adjudication.

The Supreme Court recently elected not to address this split, denying certification of a Sixth Circuit decision adopting the "broad view." See *Martin v. Behr Dayton Thermal Prods. LLC,* 896 F.3d 405 (6th Cir. 2018), *cert. denied*, No. 18-472, 2019 WL 1231762 (U.S. Mar. 18, 2019). Although this ruling invites more "issue certification" battles in the future, the unusual circumstances of *Martin* provide tools for distinguishing the case from typical consumer class actions, where injury and causation must be established to show a viable claim in the first place.

In *Martin*, a class of homeowners from a low-income neighborhood outside of Dayton, Ohio sued four companies, alleging various injuries from groundwater contamination caused by the defendants' operations. By the time of the filing of the first class action in 2008, the EPA had become involved at the pollution site and initiated an emergency removal action in 2007 (ultimately designating the area a Superfund site in 2009). 896 F.3d at 408-09.

At the class certification stage, the district court rejected plaintiffs' request for certification of a liability-only class. Although the class members shared some common issues for purposes of assessing defendants' liability, those issues did not predominate over the individualized issues under "Ohio law regarding injury-in-fact and causation." *Id*. at 409-10.

But the district court granted plaintiffs' alternative request to certify seven issues for class treatment, expressly adopting the "broad" view of class issue certification. *Id*. at 410. These issues addressed the defendants' responsibilities relative to the various pollution plumes and the class members' "potential for vapor intrusion" (which could lead to numerous health problems). *Id*. The defendants petitioned to appeal the issue certification ruling under Rule 23(f), and the plaintiffs' cross-appealed for review of the denial of liability-only class certification. The Sixth Circuit granted the defendants' petition but denied the plaintiffs' cross-appeal. *Id*. at 410-11.

On appeal, the Sixth Circuit affirmed the certification of the seven class issues and expressly adopted the "broad" view of issue certification espoused by the Second and Ninth Circuits and "supported" by decisions of the Fourth and Seventh Circuits. *Id*. at 411-13. The Court of Appeals dismissed the "narrow" view as resting on a footnote in a Fifth Circuit decision (*Castano v. American Tobacco Co*., 84 F.3d 734, 745 n.21 (5th Cir. 1996)) and "tenuous support" in an Eleventh Circuit decision (*Sacred Heart Health System, Inc. v. Humana Healthcare Services, Inc*., 601 F.3d 1159, 1170 (11th Cir. 2010)). *Id*. at 412. The Sixth

Circuit also looked favorably on decisions of the Third and Eighth Circuits it viewed as employing a "functional, superiority-like analysis instead of adopting either the broad or the narrow view." *Id*. (citing *Gates v. Rohm & Haas Co*., 655 F.3d 255, 273 (3d Cir. 2011), and In re *St. Jude Med., Inc*., 522 F.3d 836, 841 (8th Cir. 2008)).

When the Court of Appeals turned to the district court's certification of class issues, it emphasized the unique aspects of the case that made class treatment particularly desirable. After discussing the benefits to the class from having a single adjudication of the seven issues, the Court found that the defendants had not "identified any individualized inquiries that outweigh the common questions prevalent *within each issue*." *Id*. at 414. Among other things, the defendants raised no argument that contamination varied within the plumes until the time of oral argument, and that belated argument failed to persuade the Sixth Circuit "[g]iven that this case concerns many years of sustained contamination in a relatively small geographic area." *Id*. at 415.

The Court of Appeals then turned defendants' citation of *Ebert v. General Mills, Inc*., 823 F.3d 472 (8th Cir. 2016), against them, because the district court in *Ebert* rejected a "liability-only" class. *Id*. "[P]redominance problems within a liability-only class do not automatically translate into predominance problems within an issue class, and Defendants fail to explain why *Ebert* extends to issue-only classes." *Id*.

The Sixth Circuit then conducted a relatively detailed "superiority" analysis, again focusing on the specific facts of the case before it. *Id*. at 415-16. Although the defendants argued that other mechanisms existed to avoid duplicative litigation, the Court of Appeals held this suggestion "rings hollow given that this case is ten years old and Defendants have not yet agreed to such mechanisms." *Id*. at 416. In discussing the importance of conserving party and judicial resources, the Sixth Circuit noted "the record indicates that the properties are in a low-income neighborhood, meaning that class members might not otherwise be able to pursue their claims." *Id*. "Resolving the issues in one fell swoop would conserve the resources of both the court and the parties." *Id*.

The Court of Appeals dismissed the defendants' Seventh Amendment concerns, noting that the district court had not yet formalized its procedures to avoid reexamination of issues addressed in the first phase during a later phase. *Id*. at 416-17. And the fact the district court preemptively identified the need to consider Seventh Amendment concerns "suggests that it will take care to conduct any subsequent proceedings in accordance with the Reexamination Clause." *Id*. at 417.

Although the Supreme Court's decision not to review the case allows class plaintiffs in most Circuits to continue to argue for class issue certification, the unusual circumstances of *Martin* and the numerous case-specific facts figuring in the Sixth Circuit's reasoning should provide ample tools for defense counsel to limit the decision's impact in other types of class actions. Among other things, the facts of Martin indicated substantial pollution of the class plaintiffs' property creating substantial risks of vapor intrusion. As the Court of Appeals noted: "At least one school was closed and demolished when vapor mitigation systems were unable to adequately contain the levels of harmful substances in the air." *Id*. at 409. Such facts make the case for allowing class-wide determination of defendants' respective responsibilities for the pollution much more compelling than in the typical consumer fraud class action, where a serious question may exist whether any class member suffered any actual injury at all. Accordingly, class defense counsel should develop class discovery and certification strategies that address not only certification of the entire action, but also the possibility of a request for class issue

certification.