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Third Circuit examines propriety of issue certification under Federal Rule 23(c)(4)

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Takeaway: Federal Rule 23(c)(4) provides: "When appropriate, an action may be brought or maintained as a class action with respect to particular issues." Although class plaintiffs often seek "issue certification" as an alternative to full class treatment, few courts certify an issue class. In *Russell v. Educational Commission for Foreign Medical Graduates*, --- F.4th ----, No. 20-2128, 2021 WL 4343657 (3d Cir. Sept. 24, 2021), the Third Circuit set out a comprehensive set of requirements for, and considerations governing, issue certification under Rule 23(c)(4).

According to the panel, a district court presented with a request to certify an issue class must resolve three questions: "First, does the proposed issue class satisfy Rule 23(a)'s requirements? Second, does the proposed issue class fit within one of Rule 23(b)'s categories? Third, if it does, is it 'appropriate' to certify this as an issue class?" 2021 WL 4343657, at *1.

In terms of "appropriateness," a prior Third Circuit decision, *Gates v. Rohm & Haas*, 655 F.3d 255 (3d Cir. 2011), identified nine factors to consider: "1. the type of claim(s) and issue(s) in question; 2. the overall complexity of the case; 3. the efficiencies to be gained by granting partial certification in light of realistic procedural alternatives; 4. the substantive law underlying the claim(s), including any choice-of-law questions it may present and whether the substantive law separates the issue(s) from other issues concerning liability or remedy; 5. the impact partial certification will have on the constitutional and statutory rights of both the class members and the defendant(s); 6. the potential preclusive effect or lack thereof that resolution of the proposed issue class will have; 7. the repercussions certification of an issue(s) class will have on the effectiveness and fairness of resolution of remaining issues; 8. the impact individual proceedings may have upon one another, including whether remedies are indivisible such that granting or not granting relief to any claimant as a practical matter determines the claims of others; 9. and the kind of evidence presented on the issue(s) certified and potentially presented on the remaining issues, including the risk subsequent triers of fact will need to reexamine evidence and findings from resolution of the common issue(s)." Id. at *6 (quoting *Gates*, 655 F.3d at 273).

The *Gates* decision, however, did not discuss what types of issues would be appropriate for issue certification. In other words, must the issue resolve a defendant's liability, or is it enough that the issue resolve an important question that would in some material way advance the resolution of the dispute?

Resolving an issue of first impression, the panel selected the more flexible approach and decided that the certified issue need *not* resolve a defendant's liability: "We therefore hold that district courts may certify 'particular issues' for class treatment even if those issues, once resolved, do not resolve a defendant's liability, provided that such certification substantially facilitates the resolution of the civil dispute, preserves the parties' procedural and substantive rights and responsibilities, and respects the constitutional and statutory rights of all class member and defendants." *Id.* at *8.

In the case before it, however, the district court had failed to make the threshold determination that the issue class properly could be certified under one of the subdivisions of Rule 23(b), in addition to failing to undertake a meaningful analysis of the *Gates* factors. *Id*. at *12. Accordingly, the Court of Appeals vacated the district court's certification of the issue class and remanded for further proceedings consistent with its decision. *Id*.