

FEDERAL COURT REVIEW

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2d Circuit breaches barrier to class certification

Its ruling undermines a 5th Circuit precedent covering ‘issues classes.’

By Jason R. Bent

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A RECENT RULING by the 2d U.S. Circuit Court of Appeals may reinvigorate the use of so-called “issue classes” in federal courts. In *In re Nassau County Strip Search Cases*, nos. 05-4206, 05-4211 and 05-4242, 2006 WL 2441023 (2d Cir. Aug. 24, 2006), the court weighed in on a subject that has divided the federal circuits—“whether a court may employ Rule 23(c)(4)(A) to certify a class as to a specific issue where the entire claim does not satisfy Rule 23(b)(3)’s predominance requirement.” *Id.* at *5. The court answered that question in the affirmative, clearing the path for lower courts to certify issue classes more frequently.

Federal Rule of Civil Procedure 23(c)(4)(A) provides that, when appropriate, “an action may be brought or maintained as a class action with respect to particular issues.” Until the mid-1990s, federal courts had employed Rule 23(c)(4)(A) liberally to divide cases into common issues subject to class treatment, and individual issues that would be addressed individually in separate mini-trials. Thus, courts frequently would certify issue classes with respect to common liability issues in mass tort cases, while leaving individual issues such as causation and compensatory damages for individual jury trials. See Jon Romberg, “Half a Loaf is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A),” 2002 Utah L. Rev. 249, 271 (2002).

In 1996, however, the 5th Circuit

delivered an opinion that would put the brakes on issue classes. In *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996), the court ruled that common issues must predominate over individual issues, pursuant to the requirements of Rule 23(b)(3), even if those common issues could be severed from the individual issues and treated as an issue class under Rule 23(c)(4)(A). In a single footnote, the 5th Circuit relegated subsection (c)(4)(A) to a mere “housekeeping rule.”

“Severing the defendants’ conduct from reliance under rule 23(c)(4) does not save the class action,” the 5th Circuit said. “A district court cannot manufacture predominance through the nimble use of subdivision (c)(4). The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial.” *Id.* at 745 n.21.

After *Castano*, several district courts across the country adopted the 5th Circuit’s reasoning, refusing to use subsection (c)(4) to certify issue classes when the predominance requirement was not met as to the cause of action as a whole. See, e.g., *Hamilton v. O’Connor Chevrolet Inc.*, No. 02 C 1897, 2006 WL 1697171 (N.D. Ill. June 12, 2006); *Rink v. Cheminova Inc.*, 203 F.R.D. 648 (M.D. Fla. 2001); *Cohn v. Massachusetts Mut. Life Ins. Co.*, 189 F.R.D. 209 (D. Conn. 1999).

A few courts, including the 9th Circuit, took a different view. In *Valentino v. Carter-Wallace Inc.*, 97 F.3d 1227 (9th Cir. 1996), that court vacated a district court order that had conditionally certified a nationwide class of plaintiffs against a drug manufacturer, and remanded the case for further proceedings.

But in doing so, the court left the door open for issue classes on remand: “Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues.” *Id.* at 1234. See also *Simon v. Philip Morris Inc.*, 200 F.R.D. 21 (E.D.N.Y. 2001). These cases suggested that at least some courts were not ready to write off Rule 23(c)(4)(A) as a mere housekeeping rule.

The 2d Circuit’s take on the issue has been much anticipated, leading one scholar to predict that a ruling by the 2d Circuit in a high-profile case might “serve as a flash point for the ultimate fate of issue classes.” See Romberg, 2002 Utah L. Rev. at 297.

Benchmark ruling

The 2d Circuit’s decision in *Nassau County* likely will serve as the benchmark that courts and scholars anticipated. The court provided perhaps the most considered analysis to date of the interplay between Rule 24(c)(4)(A) and Rule 23(b)(3), before concluding that the *Castano* approach to issue classes was too restrictive.

In *Nassau County*, the plaintiffs were individuals who had been arrested for, or charged with, misdemeanor offenses, and who had been strip-searched pursuant to a blanket policy of the Nassau County, N.Y., Correctional Center. The plaintiffs sought to challenge the constitutionality of the blanket strip-search policy. They argued that because they were arrested on only misdemeanor charges, and because the correctional center lacked any individualized suspicion to justify any of the strip searches, the blanket strip-search policy violated 42 U.S.C. 1983 and the Fourth, Fifth, Eighth and 14th amendments

Jason R. Bent is a principal and founder of Smith & Bent in Chicago, where he practices complex commercial litigation and employment law. He can be reached at jbent@smithandbent.com.

to the U.S. Constitution.

The plaintiffs asked that the district court certify a Rule 23(b)(3) class solely on the issue of the defendants' liability, pursuant to Rule 24(c)(4)(A). The defendants conceded liability, in an attempt to remove what defendants considered the only common issue. Because the correctional center had already changed its blanket strip-search policy, the defendants thought this would be a way to avoid class certification.

The district court denied the plaintiffs' motion for certification of the issue class. First, the district court, relying on *Castano*, expressed serious doubt that it could use Rule 24(c)(4)(A) to certify an issue class when it had determined that the action as a whole would fail the predominance test of Rule 23(b)(3). Second, the district court determined that even if an issue class would otherwise have been appropriate, the defendants' concession of the common issues of liability left only individual issues, making class certification inappropriate.

The 2d Circuit reversed in part and remanded in part, with instructions to certify an issue class. In doing so, the court took direct aim at the *Castano* opinion. The court framed the issue, as follows: "Whether a court may employ Rule 23(c)(4)(A) to certify a class as to a specific issue where the entire claim does not satisfy Rule 23(b)(3)'s predominance requirement is a matter of first impression in this Circuit....It also is a matter as to which the Circuits have split." *Nassau County*, 2006 WL 2441023, at *5. After describing the *Castano* and *Valentino* opinions, the court declared: "We agree with the Ninth Circuit's view of the matter." *Id.* at *6.

The 2d Circuit expressly rejected the 5th Circuit's view of Rule 23(c)(4)(A) as a housekeeping rule. Instead, the 2d Circuit held that Rule 23(c)(4)(A) could be used as a tool "to certify a class as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement." *Id.* at *7. The court started with the plain language of Rule 23, finding that it dictates that a court must "first identify the issues potentially appropriate for certification 'and...then' apply the other provisions of the rule, i.e., subsection (b)(3) and its predominance analysis." *Id.* at *6.

Next, the court looked to the Advisory Committee Notes. With respect to Rule 24(c)(4), the notes provide: "For example, in a fraud or similar case the action may retain its 'class' character only through the adjudication of liability to the class; the

members of the class may thereafter be required to come in individually and prove the amounts of their respective claims." Fed. R. Civ. P. 23(c)(4), Advisory Committee Notes. The 2d Circuit placed great weight on the use of the word "only" in the notes, finding that it referred to situations in which common issues would predominate only if they were isolated by the use of Rule 24(c)(4).

The court then turned to the 5th Circuit's holding in *Castano*, and specifically rejected it because it would render subsection (c)(4) of Rule 23 "virtually null." *Nassau County*, 2006 WL 2441023, at *7. Under the *Castano* reasoning, the 2d Circuit explained, courts considering the manageability of a class action under Rule 23(b)(3) would have to pretend that subsection (c)(4) did not exist until after the manageability determination had been made. *Id.* at *7 (citing *Gunnells v. Healthplan Servs. Inc.*, 348 F.3d 417 (4th Cir. 2003)). Thus, under *Castano*, a court could use Rule 23(c)(4) to manage cases only after they had already been deemed manageable without the aid of issue classes under subsection (c)(4), making subsection (c)(4) useless. *Id.* at *7. In other words, the *Castano* reasoning would not just render subsection (c)(4) a housekeeping rule—it would eviscerate it altogether.

'Castano' would have eviscerated the issue certification rule.

Finally, the 2d Circuit drew support from a number of leading legal scholars and commentators who have endorsed the liberal use of issue classes under Rule 23(c)(4), even when the action as a whole might not satisfy the predominance requirement. *Id.* at *7 (citing 7AA Wright & Miller, *Federal Practice & Procedure* § 1790 (3d ed. 2005), and Alba Conte and Herbert B. Newberg, *Newberg on Class Actions* § 18:7 (4th ed. 2002)). The court concluded: "[W]e hold that a court may employ subsection (c)(4) to certify a class as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement." *Id.* at *7.

Shrinking from perverse result

The 2d Circuit went on to reject the district court's finding that the defendants' concession of common liability issues could

help the defendants defeat class certification. Among other reasons, the court refused to permit the perverse result that the defendants would escape the cost of their behavior precisely because their liability was too plain to be denied. See *id.* at *8. Ultimately, the 2d Circuit remanded to the district court with instructions to certify an issue class as to liability, and to consider a broader certification that would include certain damages issues. *Id.* at *10.

Nassau County represents an important benchmark in the viability of issue classes under Rule 23(c)(4)(A), but it is not the final word. The circuits remain split, with only the 5th, 9th and now the 2d having taken relatively clear positions. Until other circuits choose sides, or until the U.S. Supreme Court definitively resolves the issue, district courts in the remaining circuits are free to follow the reasoning they find most persuasive.

If *Nassau County* proves to be influential, it could signal the widespread re-emergence of issue class certification. The impact of *Nassau County* will be most prominent in mass tort cases, where common liability issues might effectively be decided on a classwide basis, and in nationwide classes, where individual issues involving differing state laws might be severed from common issues that could be handled with a Rule 23(c)(4)(A) issue class.

Likewise, *Nassau County* could lead to forum shopping by plaintiffs in these nationwide and mass tort cases. Plaintiffs in such cases are often forced into federal court under the Class Action Fairness Act (CAFA), codified at 28 U.S.C. 1332(d), which confers federal subject-matter jurisdiction over class actions in which the aggregate amount in controversy exceeds \$5 million, subject to certain exceptions. These plaintiffs may now choose to file in federal district courts within the 2d Circuit to take advantage of *Nassau County*'s favorable treatment of issue classes.

While individual issues might predominate over common issues in such cases, when viewed as a whole, district courts following *Nassau County* may use Rule 23(c)(4)(A) to carve out the common issues and certify an issue class. ■

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