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Shaquille Grant
Southern Methodist University, Dedman School of Law

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ISSUE CLASSING—THE EXPRESS CHECKOUT OF CLASS ACTIONS

Shaquille Grant *

In *Martin v. Behr Dayton Thermal Products LLC*, the Sixth Circuit interpreted how Federal Rule of Civil Procedure 23(b)(3)'s requirements interact with Federal Rule of Civil Procedure 23(c)(4).[1] Rule 23(b)(3) provides that a class action may be certified if a "court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[2] Rule 23(c)(4) provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues."[3] The Sixth Circuit recently held that the interaction between Rule 23(b)(3) and Rule 23(c)(4) should be interpreted broadly.[4] Under the "broad" view, "courts apply the Rule 23(b)(3) predominance and superiority prongs after common issues have been identified for class treatment under Rule 23(c)(4)."[5] The Sixth Circuit was correct in its holding because the broad view leads to an efficient allocation of judicial resources while remaining faithful to the text and purpose of Rule 23.

Martin arose from "Defendants' alleged contamination of the groundwater in the McCook Field neighborhood of Dayton, Ohio."[6] "Plaintiffs own[ed] properties in McCook Field, which is a low-income area surrounding a Superfund site."[7] Defendants were four Delaware corporations authorized to do business in Ohio: (1) Behr Dayton Thermal Products LLC; (2) Behr America, Inc.; (3) Chrysler Motors LLC; and (4) Aramark Uniform & Career Apparel, Inc.[8]

* J.D. Candidate, SMU Dedman School of Law, 2020; B.A., Hendrix College, 2017. Thanks to my friends and family for always supporting me.

1. Martin v. Behr Dayton Thermal Prods. LLC, 896 F.3d 405, 411–13 (6th Cir. 2018); *see also* Susan E. Abitanta, Comment, *Bifurcation of Liability and Damages in Rule 23(b)(3) Class Actions: History, Policy, and a Solution*, 36 SW. L.J. 743, 747–57 (1982) (tracing the history and application of issue classing in complex litigation).
2. FED. R. CIV. P. 23(b)(3).
3. FED. R. CIV. P. 23(c)(4).
4. *See Martin*, 896 F.3d at 413.
5. *Id.* at 411.
6. *Id.* at 408.
7. *Id.*
8. *Id.*

Plaintiffs alleged that Defendants released volatile organic compounds (VOCs) and other hazardous substances into the groundwater under Plaintiffs' properties and were deliberately indifferent to the harm caused.[9] Behr and Chrysler allegedly knew about the VOC contamination since 2000 but failed to take steps to remedy the situation or stop its spread.[10] Aramark was allegedly aware of the VOC contamination since 1992.[11]

Plaintiffs originally filed suit in Ohio state court in 2008, but Chrysler removed the action to federal district court under the Class Action Fairness Act (CAFA).[12] The court then consolidated the case with two related actions.[13] Plaintiffs' 2015 Master Amended Class Action Complaint included eleven causes of action.[14] Plaintiffs sought Rule 23(b)(3) class certification "as to liability only for five of their eleven causes of action—private nuisance, negligence, negligence per se, strict liability, and unjust enrichment."[15] Alternatively, they requested Rule 23(c)(4) certification of seven common issues.[16]

The district court determined that Plaintiffs' proposed classes could not satisfy Rule 23(b)(3)'s predominance requirement.[17] Therefore, the court denied certification of the classes.[18] However, the district court certified Plaintiffs' request in the alternative for class certification under Rule 23(c)(4).[19] The seven issues certified for class treatment were:

> *Issue 1*: Each Defendant's role in creating the contamination within their respective Plumes, including their historical operations, disposal practices, and chemical usage;
>
> *Issue 2*: Whether or not it was foreseeable to Chrysler and Aramark that their improper handling and disposal of TCE and/or PCE could cause the Behr-DTP and Aramark Plumes, respectively, and subsequent injuries;
>
> *Issue 3*: Whether Chrysler, Behr, and/or Aramark engaged in abnormally dangerous activities for which they are strictly liable;
>
> *Issue 4*: Whether contamination from the Chrysler-Behr Facility underlies the Chrysler-Behr and Chrysler- Behr-Aramark Class Areas;
>
> *Issue 5*: Whether contamination from the Aramark Facility underlies the Chrysler-Behr-Aramark Class Area;
>
> *Issue 6*: Whether Chrysler and/or Aramark's contamination, and all three Defendants' inaction, caused class members to incur the potential for vapor intrusion; and

9. *Id.*
10. *Id.*
11. *Id.* at 409.
12. *Id.* (citing 28 U.S.C. § 1332(d)(2) (2012)).
13. *Id.*
14. *Id.* The causes of action were trespass, private nuisance, unjust enrichment, strict liability, negligence, negligence per se, battery, intentional fraudulent concealment, constructive fraud, negligent misrepresentation, and civil conspiracy. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 409–10.
18. *Id.* at 410.
19. *Id.*

> *Issue 7*: Whether Defendants negligently failed to investigate and remediate the contamination at and flowing from their respective Facilities.[20]

Defendants appealed, arguing that the district court reached the wrong conclusion on the interaction between Rule 23(b)(3) and Rule 23(c)(4) and, alternatively, that even if the district court was correct, the issue classes still should not have been certified.[21] The Sixth Circuit had never ruled on the interaction between Rule 23(b)(3)'s requirements and Rule 23(c)(4) before this case.[22] However, a circuit split exists regarding the interaction of these rules, and the Sixth Circuit decided to adopt the broad view.[23]

There are three views regarding the proper interaction of Rule 23(b)(3) and Rule 23(c)(4): the broad view, the "narrow" view, and the "functional" view.[24] The broad view has been adopted by the Second,[25] Fourth,[26] Seventh,[27] Ninth,[28] and now the Sixth Circuit.[29] The narrow view has been adopted by the Fifth Circuit[30] and has received weak support from the Eleventh Circuit.[31] The Third Circuit has adopted a "functional, superiority-like analysis."[32] The Eighth Circuit has also espoused a similar framework.[33] For simplicity, the Third and Eighth Circuit analyses are referred to here as the functional view.

The broad view states that courts should apply the Rule 23(b)(3) predominance and superiority prongs after common issues have been identified for class treatment under Rule 23(c)(4).[34] Under the narrow view, the cause of action as a whole must satisfy the predominance requirement of Rule 23(b)(3), and Rule 23(c)(4) serves as a housekeeping rule that allows courts to sever common issues for a class trial.[35] The functional view focuses on increasing litigation efficiency.[36]

20. *Id.*

21. *Id.*

22. *Id.* at 412.

23. *Id.* at 411–13.

24. *See* 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 4:43 (16th ed. 2019); *see also* RICHARD A. NAGAREDA ET AL., THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 248 (2d ed. 2013) (explaining that courts and academics alike are divided on this issue).

25. *See In re* Nassau Cty. Strip Search Cases, 461 F.3d 219, 227 (2d Cir. 2006).

26. *See* Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 441 (4th Cir. 2003).

27. *See* McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 491 (7th Cir. 2012), *abrogated on other grounds by* Phillips v. Sherriff of Cook County, 828 F.3d 541 (7th Cir. 2016).

28. *See* Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996).

29. *See* Martin v. Behr Dayton Thermal Prods. LLC, 896 F.3d 405, 413 (6th Cir. 2018).

30. *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996); *but see Martin*, 896 F.3d at 412 (noting that subsequent Fifth Circuit caselaw "indicates that any potency the narrow view once held there has dwindled").

31. *See* Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc., 601 F.3d 1159, 1176 (11th Cir. 2010) (denying certification but recognizing the practice of creating subclasses in complex class actions).

32. *Martin*, 896 F.3d at 412; *see* Gates v. Rohm & Haas Co., 655 F.3d 255, 273 (3d Cir. 2011) (adopting the factors set forth in PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §§ 2.02–.05 (AM. LAW INST. 2010)).

33. *See In re* St. Jude Med., Inc., 522 F.3d 836, 841 (8th Cir. 2008) (declining to certify issue classes that "would do little to increase the efficiency of the litigation").

34. *See Martin*, 896 F.3d at 411; 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:91 (5th ed. 2011 & Supp. 2019) [hereinafter NEWBERG ON CLASS ACTIONS].

35. *See Castano*, 84 F.3d at 745 n.21; NEWBERG ON CLASS ACTIONS, *supra* note 34, § 4:91.

36. *See Gates*, 655 F.3d at 273; *In re St. Jude*, 522 F.3d at 841; *see also* Jenna G. Farleigh, Note,

The Sixth Circuit determined that the broad view respects each provisions' contribution to class determination by maintaining 23(b)(3)'s rigor without rendering Rule 23(c)(4) superfluous because it retains the predominance factor but applies it after identifying issues suitable for class treatment.[37] Therefore, the broad view does not risk undermining the predominance requirement.[38] However, the narrow view would "virtually nullify" Rule 23(c)(4).[39]

Further, the Sixth Circuit determined that the broad view flowed naturally from the text of Rule 23 because it provides for issue classing "[w]hen appropriate."[40] Notably, a prior version of Rule 23 even instructed that issues for class treatment should be selected before the remainder of Rule 23's provisions were construed and applied.[41] The changes to the text of Rule 23 were intended to be "stylistic only."[42] Finally, the Sixth Circuit determined that the broad view promotes efficient use of Rule 23(c)(4) because it retains Rule 23(b)(3)'s superiority requirement.[43] Therefore, the broad view also encompasses the functional view because the superiority requirement effectively serves as a "backstop" against inefficiency.[44]

After adopting the broad view, the Sixth Circuit applied it to the facts of the case at hand. The court determined that the seven common issues certified for class treatment met the requirements of Rule 23(b)(3), meaning that they were predominated by common issues and that class treatment was superior to adjudicating the common issues in individual actions.[45]

To evaluate predominance under Rule 23(b)(3), "[a] court must first characterize the issues in the case as common or individual and then weigh which predominate."[46] An individual question is one where "members of a proposed class will need to present evidence that varies from member to member,"[47] and a common question is one where "the same evidence will suffice for each member to make a prima facie case or the issue is susceptible to generalized, class-wide proof."[48] The Sixth Circuit determined that each of the seven issues certified by the district court was capable of resolution with generalized, class-wide proof.[49] Additionally, all seven issues were questions that only needed to be answered once because the answers applied in the same way to each plaintiff.[50] Therefore, the

Splitting the Baby: Standardizing Issue Class Certification, 64 VAND. L. REV. 1585, 1623–25 (2011) (examining the merits of the functional view).

37. *Martin*, 896 F.3d at 413.
38. *Id.*
39. *Id.*
40. *Id.* (quoting FED. R. CIV. P. 23(c)(4)).
41. *Id.* (referencing FED. R. CIV. P. 23(c)(4)(B) (repealed 2007)).
42. *Id.* (quoting FED. R. CIV. P. 23(c)(4) advisory committee's note to 2007 amendment).
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* (emphasis and citation omitted).
47. *Id.* at 414 (quoting Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045 (2016)).
48. *Id.* (quoting *Tyson Foods*, 136 S. Ct. at 1045).
49. *Id.*
50. *Id.*

Sixth Circuit determined that the issues were predominated by common issues.[51]

To evaluate superiority under Rule 23(b)(3), a court must consider the difficulties of managing a class action, compare other means of disposing of the suit, and consider the value of individual damage awards—with small awards weighing in favor of class actions.[52] The Sixth Circuit determined that if plaintiffs brought individual suits, the seven issues would need to be addressed in each individual case.[53] Therefore, in order to conserve the resources of the court and the parties, as well as materially advance the litigation, a class action was the superior method of adjudication.[54]

The Sixth Circuit correctly adopted the broad view for two reasons. First, the broad view is faithful to the purpose of the Federal Rules of Civil Procedure. Second, the broad view is faithful to the text of Rule 23.

The purpose of the Federal Rules of Civil Procedure is "to secure the just, speedy, and inexpensive determination of every action and proceeding."[55] Additionally, the rules should be given their plain meaning.[56] Further, any interpretation that renders a rule superfluous should be avoided.[57] With these concepts in mind, it is obvious that the broad view is the proper way to view the interaction of Rule 23(b)(3) and Rule 23(c)(4).

First, the broad view is faithful to the purpose of the Federal Rules of Civil Procedure because it allows for common issues to be severed from the individual issues and be adjudicated only once. This allows for the most effective advancement of complex lawsuits because it allows for certification whenever it would accomplish a "materially useful purpose, given the entirety of the underlying controversy."[58] This allows for an efficient allocation of judicial resources—saving both time and money—by not requiring common issues to be adjudicated multiple times in individual cases.[59] This sentiment squares nicely with the stated purpose of the Federal Rules of Civil Procedure.[60]

51. *Id.* at 415.

52. *Id.* at 415–16 (citing Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich., 654 F.3d 618, 630–31 (6th Cir. 2011)); *see also* NEWBERG ON CLASS ACTIONS, *supra* note 34, § 1:7 (detailing the rationale for the class action device as a means of recovery for plaintiffs bringing individual claims for "small amounts of money").

53. *Martin*, 896 F.3d at 416.

54. *Id.*

55. FED. R. CIV. P. 1.

56. Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 498 U.S. 533, 540 (1991) ("[The Supreme Court] give[s] the Federal Rules of Civil Procedure their plain meaning." (citation and internal quotation marks omitted)).

57. *See, e.g.*, Gangemi v. Moor, 268 F. Supp. 19, 21–22 (D. Del. 1967).

58. *See* NEWBERG ON CLASS ACTIONS, *supra* note 34, § 4:91 (emphasis omitted) (citing 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, 289); Elizabeth Chamblee Burch, *Constructing Issue Classes*, 101 VA. L. REV. 1855, 1891–96 (2015) (making a similar point).

59. *See Martin*, 896 F.3d at 416; Joseph A. Seiner, *The Issue Class*, 56 B.C. L. REV. 121, 154 (2015).

60. *See* FED. R. CIV. P. 1; *see also* Kindaka Jamal Sanders, *Re-Assembling Osiris: Rule 23, the Black Farmers Case, and Reparations*, 118 PENN ST. L. REV. 339, 356–57 (2013) ("The procedural purpose of the class action is *judicial economy*. The theory is . . . if the interests of the active and absent plaintiffs are aligned closely enough, . . . simply resolving the interests of the active plaintiffs can save time, effort, and expense, thus also resolving the issues of the absent plaintiffs." (emphasis added) (footnote

The broad view is also faithful to the text of Rule 23 because it gives credence to the phrase "[w]hen appropriate."[61] By allowing common issues to be certified if they meet the predominance and superiority requirements of Rule 23(b)(3), the broad view maintains 23(b)(3)'s rigor without rendering Rule 23(c)(4) superfluous.[62] While there is concern that the broad view would lead to certification in every case that presents common issues,[63] retaining Rule 23(b)(3)'s superiority prong under the broad view alleviates this concern.[64] Utilizing superiority as a backstop against inefficient use of Rule 23(c)(4) ensures that issue classes are granted only when they are the best way to adjudicate the common issues. Therefore, Rule 23(b)(3) is not undercut, and Rule 23(c)(4) can serve its purpose.

In contrast, the narrow view would render Rule 23(c)(4) superfluous by making it usable only when it is unnecessary.[65] This violates the rule of statutory construction that any interpretation rendering a rule superfluous should be avoided.[66] Therefore, the narrow view should be abandoned. Additionally, by retaining Rule 23(b)(3)'s superiority requirement, the broad view basically encompasses the functional view, which is not based in the text of the rule.[67]

There are concerns that the broad view might cause Seventh Amendment issues since it leads to the bifurcation of trials, which can violate the Reexamination Clause.[68] While it is true that an improperly bifurcated trial violates the Reexamination Clause, it should be noted that a properly bifurcated trial does not raise any constitutional issues.[69] Overall, this is a procedural issue that can be avoided by a prudent district court's selection and implementation of procedure that will not raise constitutional issues.[70]

Martin held that the interaction of Rule 23(b)(3) and Rule 23(c)(4) should be interpreted broadly. That is, courts should apply Rule 23(b)(3)'s predominance and superiority prongs after common issues have been identified for class treatment under Rule 23(c)(4). The Sixth Circuit adopted the broad view because it respects both provisions' contributions to class certification, is faithful to the

omitted)).

61. FED. R. CIV. P. 23(c)(4).

62. *See* NEWBERG ON CLASS ACTIONS, *supra* note 34, § 4:91.

63. *See, e.g.*, Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 807–08 (2013).

64. *See Martin*, 896 F.3d at 415–16.

65. *See* NEWBERG ON CLASS ACTIONS, *supra* note 34, § 4:91.

66. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 180 (2012) (defining the "Harmonious-Reading Canon").

67. *See* Romberg, *supra* note 58, at 300–01 (examining the interaction of Rule 23(b)(3)'s superiority requirement and Rule 23(c)(4) issue classing).

68. The Seventh Amendment entitles parties to have related issues of fact decided by one jury and prohibits a second jury from reexamining those facts and issues. *See* U.S. CONST. amend. VII, cl. 2; *see also, e.g.*, *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1302–04 (7th Cir. 1995) (detailing the possible Seventh Amendment problems that can stem from issue class certification).

69. *See Martin*, 896 F.3d at 417 (quoting Olden v. LaFarge Corp., 383 F.3d 495, 509 n.6 (6th Cir. 2004)); Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499, 541–42 (1998).

70. *See Martin*, 896 F.3d at 417; *see also* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1440 (1995) ("This Seventh Amendment objection seems a weak argument . . . .").

text of Rule 23, and protects against the inefficient use of Rule 23(c)(4). In adopting the broad view, the Sixth Circuit deepened the circuit split and added more support to the majority view. The Sixth Circuit ruled correctly because the broad view leads to an efficient allocation of judicial resources while remaining faithful to the purpose and text of Rule 23.