

Complex Litigation

'Tyson Foods': Bifurcation Taking Center Stage?

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Bifurcation under Federal Rule of Civil Procedure 23(c)(4) is a critical, but often underappreciated, tool for both plaintiffs and defendants in class action cases. The Second Circuit is one of the few circuits to have expressly held Rule 23(c)(4) broadly permits bifurcation “to certify a class as to an issue regardless of whether the claim as a whole satisfies the predominance test.” *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 221 (2d Cir. 2006). Bifurcation of liability and damages is permitted if “the proposed class satisfies the requirements of Rule 23(a) and (b) with respect to liability” and “resolution of the particular common issues would materially advance the disposition of the litigation as a whole.” *Houser v. Pritsker*, 28 F. Supp. 3d 222, 254 (S.D.N.Y. 2014). Rule 23(c)(4) has been used

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frequently to certify a class for liability purposes where damages cannot be determined on a class-wide basis.¹ Bifurcation can be pursued by motion or by the court *sue sponte*, and at any time during the litigation. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 395 (1980); cf. *Perez v. Allstate Ins. Co.*, No. 11-CV-1812(JFB)(AKT), 2014 WL 4635745 (E.D.N.Y. Nov. 16, 2015).

Of course, bifurcation can conserve judicial resources by resolving certain issues together even where predominance would preclude class treatment of all issues. But parties can also benefit mightily. For certain individual plaintiffs whose claims may be otherwise inappropriate for class treatment, bifurcation can facilitate the trial of liability on

a class-wide basis and cabin those issues that require more individualized treatment in a subsequent trial of damages—in effect, rescuing the plaintiff's claims from being abandoned or never brought in the first place. For a defendant, bifurcation can help to ensure Due Process by allowing a defendant to raise nuanced challenges to the evidence at the damages phase that might otherwise be overwhelmed by or subsumed in the consideration of liability.

Bifurcation has been in use for many years, albeit quietly, but recent Supreme Court case law addressing commonality and predominance under Rules 23(a) and 23(b)(3) suggests that practitioners must focus anew on the benefits and pitfalls of this device.

'Wal-Mart,' 'Comcast,' and Predominance

Rule 23(b)(3) allows for class certification if “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that the class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). The Supreme Court's decisions in *Wal-Mart* and *Comcast*, respectively in 2011 and 2013, seemingly raised the bar for establishing predominance. *Comcast v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011).

Although decided on Rule 23(a)(2) commonality grounds—and not Rule 23(b)(3) predominance grounds—*Wal-Mart* shifted the class-action landscape by cast-

ing doubt on the extent to which individual evidence can be extrapolated or used to prove elements of a class's claim or its damages. The *Wal-Mart* court reversed the certification of a class of 1.5 million current and former female employees at Wal-Mart who alleged gender discrimination in pay and promotions. The plaintiffs' theory of commonality was that Wal-Mart employed a “strong and uniform ‘corporate culture’” of gender bias. *Wal-Mart*, 131 S. Ct. at 2548. To support this theory, the plaintiffs relied in part on evidence extrapolated from a random sample of class members. The court rejected this approach. *Id.* at 2561. It explained that a “Trial by Formula” to satisfy Rule 23 would deprive the defendant of an opportunity to litigate individualized defenses, thereby modifying substantive rights in a manner that is prohibited by the Rules Enabling Act. *Id.*

The Supreme Court's subsequent decision in *Comcast* further addressed the use of statistical evidence to establish class certification, this time interpreting Rule 23(b)(3)'s predominance requirement. *Comcast* involved allegations of anticompetitive conduct by Comcast in the Philadelphia area and of common antitrust injury pursuant to four distinct theories. *Comcast*, 133 S. Ct. at 1430-32. In certifying the class, the district court accepted only one of the four theories of injury but accepted a damages model premised on the success of all four theories. *Id.* The Court of Appeals for the Third Circuit affirmed. *Id.*

In a 5-4 opinion authored by Justice Antonin Scalia, the U.S. Supreme

Court reversed the class certification order as improperly granted under Rule 23(b)(3). The majority decision rested specifically on the failure of the plaintiffs' damages model to measure solely the damages flowing from the single theory of injury accepted by the district court. *Id.* at 1432-33. Requiring a “rigorous analysis” of the named plaintiffs' proposed proof at class certification, Scalia found the plaintiffs' damages model incapable of measuring damages on a class-wide basis because of this incongruence between the accepted liability theory and the expert's damages model. *Id.* at 1433. As a result, individualized damages determinations would be required and predominance could not be demonstrated.

Comcast has caused a considerable amount of confusion in the lower courts. Certain courts have cited Justice Scalia's expansive language to require uniform, class-wide proof of damages at the certification stage.² Others have interpreted *Comcast* more narrowly such that a congruence between the plaintiffs' theory of damages and their proposed proof of damages is sufficient to meet the “rigorous analysis” of predominance described by Scalia.³ Most relevant for present purposes are the numerous courts that have effectively side-stepped *Comcast* by bifurcating liability and damages and thus reducing or eliminating the plaintiffs' burden of showing the required congruence and proof of class damages.⁴

Against this somewhat opaque backdrop, the Supreme Court's recent opinion in *Tyson Foods* has clarified *Wal-Mart* and *Comcast* for class-action practitioners and

connected the dots between the predominance inquiry and bifurcation in critical ways.

'Tyson Foods'

Issued on March 22nd, *Tyson Foods* further defines the role of representative evidence as a means of establishing predominance. It also demonstrates the risks and rewards of bifurcating liability and damages phases in a Rule 23(b)(3) class action, perhaps inviting future defendants to seek bifurcation more readily to avoid a class-wide damages award.

In *Tyson Foods*, plaintiff-workers at an Iowa pork processing plant brought a federal collective action under the Fair Labor Standards Act and a Rule 23 class action alleging violation of Iowa state law. The plaintiffs alleged that Tyson failed to pay them for time spent "donning and doffing" protective equipment. Because Tyson had not kept records of the time spent by each plaintiff donning and doffing, the plaintiffs conducted their own expert analysis based on a sample of approximately 700 workers to calculate the average time it takes one worker to don and doff equipment. Significantly, the plaintiffs' expert analysis indicated that certain of the workers in the plaintiffs' class had, in fact, been paid already for the time spent donning and doffing their equipment. Multiplied across the entire class of workers entitled to damages, one of the plaintiffs' experts calculated the average time spent donning and doffing would result in a jury award of \$6.7 million.

Rejecting a request by the plaintiffs to bifurcate class action treatment of liability and damages, the district

court certified a class on both issues pursuant to Rule 23(b)(3). After a trial, the jury returned a \$2.9 million verdict in favor of the class; critically, the jury did not specify how it arrived at its \$2.9 million award or why it rejected the plaintiffs' request for a \$6.7 million class-wide award. The U.S. Court of Appeals for the Eighth Circuit affirmed the district court's class certification decision and the jury's award.

Before the Supreme Court, Tyson challenged the use of "representative evidence" to establish liability and damages, and that uninjured class members may be awarded a portion of the jury's lump sum award. In an opinion authored by Justice Anthony Kennedy for a six-Justice majority, the Supreme Court held for the plaintiffs. In so doing, the court rejected a request by Tyson Foods "that the Court should announce a broad rule against the use in class actions of what the parties call representative evidence." *Tyson Foods*, 136 S. Ct. at 1046. To the contrary, as Justice Kennedy wrote, "[w]hether and when statistical evidence can be used to establish classwide liability will depend on the purpose for which the evidence is being introduced and on 'the elements of the underlying cause of action.'" Id. Justice Kennedy emphasized that *Wal-Mart* "does not stand for the broad proposition that a representative sample is an impermissible means of establishing classwide liability." Id. at 1048.

Writing specifically on the issue of predominance and hinting at the appeal of bifurcation, Justice Kennedy quoted from several treatises to clarify that "[w]hen one or more of the central issues in the action are common to the class and can

be said to predominate, the action may be considered proper under Rule 23(b)(3) *even though other important matters will have to be tried separately, such as damages* or some affirmative defenses peculiar to some individual class members." Id. at 1045 (internal citations and quotation marks omitted; emphasis added). In other words, bifurcation can allow named plaintiffs to obtain class certification even where a common damages model cannot be shown and individual damages questions persist.

Tyson further argued that where a proposed plaintiff class includes uninjured class members, the class must offer a mechanism to ensure that uninjured class members do not receive damages. Although Justice Kennedy found Tyson's argument to be premature without further factual development, he showed little sympathy for it. Acknowledging that Tyson would be free to challenge the district court's damages allocation process when or if that process is adopted by the district court, Justice Kennedy expressly stated that "it bears emphasis that this problem appears to be one of petitioner's own making." Id. at 1050. As Justice Kennedy explained, Tyson had opposed bifurcation of liability and damages determinations before the district court. Id. at 1050. Justice Kennedy thus questioned whether Tyson could now "profit from the difficulty it caused" by successfully opposing bifurcation. Id. at 1050.

Chief Justice John Roberts, joined by Justice Samuel Alito Jr., separately addressed the uninjured class member issue in a concurring opinion. While agreeing the issue was premature, he expressed greater skepticism than the majority did

for the lower court's capacity to identify class members not entitled to damages. Emphasizing the lump-sum nature of the jury's award, the concurring Justices questioned how the lower court could "reverse engineer the verdict to determine how much donning and doffing time the jury found Tyson owed workers in each department." *Id.* at 1051 (Roberts, C.J., concurring). Perhaps inviting a future challenge by Tyson to the lower court's proceedings on remand, the concurring opinion opined that "if there is no way to ensure that the jury's damages award goes only to injured class members, that award cannot stand." *Id.* at 1053. As Chief Justice Roberts wrote, "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Id.*

Tyson Foods's discussion of bifurcation could have a substantial effect on Rule 23(b)(3) class actions. Justice Kennedy suggested that Tyson may have erred by opposing class certification in its entirety rather than agreeing to bifurcation. Arguably, Tyson faced a high-stakes gamble that class action defendants have faced with more frequency since the Supreme Court heightened Rule 23(b)(3) predominance and other requirements at the class certification stage in cases such as *Wal-Mart* and *Comcast*. On the one hand, those newly heightened requirements encourage defendants to place their hopes squarely on challenging the named plaintiffs' class-wide proof and the predominance of the issues to defeat class certification. Rejecting bifurcation, as Tyson did, is entirely consistent with that focus on defeating class certification; in

fact, bifurcation arguably provides plaintiffs an "end run" around those requirements in certain cases by decoupling liability and damages and allowing certain issues to be handled in an individualized manner rather than tried on a class-wide basis. In short, cases such as *Wal-Mart* and *Comcast* have fostered an all-or-nothing gamble to attack class certification based on the absence of commonality or predominance.

But such a narrow focus may blind defendants in certain cases to the benefits of bifurcation, particularly in the event that the named plaintiffs obtain class certification. Justice Kennedy's opinion in *Tyson Foods* demonstrates that, where class plaintiffs are relying heavily on "representative evidence" to prove liability and damages across the entire class, a defendant may be better off challenging such evidence in bifurcated trials that provide more and fuller opportunities to reveal its weaknesses. Thus, *Tyson Foods* should give pause to defense counsel to weigh the benefits of bifurcation before focusing more narrowly and exclusively on defeating class certification across the board.

A parallel dynamic may be applicable to plaintiffs. In *Comcast*, for example, plaintiffs might have insulated their case from the Supreme Court's ultimate decertification of the class based on the merged class-wide liability and damages determinations by choosing a bifurcated proceeding that resolved liability and then separately addressed damages and entertained more individualized proof. Instead, the plaintiffs gambled that overcoming the substantial hurdles of class certification would obviate any need to bifurcate.

As the Supreme Court and Second Circuit continue to define the role of representative evidence in class actions, bifurcation is likely to move closer to center stage in such cases. Practitioners should map out the benefits and risks of invoking Rule 23(c)(4) in each case as early as possible to avoid it becoming just a painful afterthought.



1. See, e.g., *Gulino v. Bd. of Educ. of Sch. Dist. of City of N.Y.*, 907 F. Supp. 2d 492, 506 (S.D.N.Y. 2013) (collecting cases).

2. See, e.g., *In re Rail Freight Fuel Surcharge Antitrust Litig.—MDL No. 1869*, 725 F.3d 244, 255 (D.C. Cir. 2013) (vacating district court's class certification decision and remanding for reconsideration in light of *Comcast* and to conduct the "hard look at the soundness of statistical models that purport to show predominance").

3. See, e.g., *Roach v. T.L. Cannon*, 778 F.3d 401 (2d Cir. 2015) (limiting *Comcast* to requiring this congruence); *In Re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015) (same); *Butler v. Sears, Roebuck and Co.*, 727 F.3d 796 (7th Cir. 2013) (rejecting reading of *Comcast* that requires uniform, class-wide proof).

4. See, e.g., *In re Steel Antitrust Litig.*, No. 08 C5214, 2015 WL 5304629 (N.D. Ill. 2015) (bifurcating liability and damages in part to address *Comcast* concerns); *Dial Corp. v. News Corp.*, No. 13CV6802, 2015 WL 4104624 (S.D.N.Y. 2015) (same); *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014) (same); *In re Scotts EZ Seed Litigation*, 304 F.R.D. 397 (S.D.N.Y. 2015) (same); *Jacob v. Duane Reade*, 293 F.R.D. 578 (S.D.N.Y. 2013) (same), *aff'd* 602 Fed. App'x 3 (2d Cir. 2015).