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Managing Complex Class Litigation: Leveraging Bifurcation, Bellwether Trials, Joinder, Subclasses and Issue Classes

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Managing Complex Class Litigation

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AGGREGATION ISSUES UNDER RULE 23(c)(4) AND (5)

- Class certification is prerequisite to maintaining suit as class action
- To be certified, putative class must meet the baseline prerequisites of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation
- Must also meet at least one criteria of Rule 23(b)(1) - (3)
- Large classes can make prerequisites hard to meet – Rule 23(c) provides potential solutions

I. Rule 23(c)(5) and the Use of Subclasses

Rule 23(c)(5) provides

> "[w]hen appropriate, a class may be divided into subclasses that are each treated as a class under this rule."

- Class action treatment sacrifices individual autonomy and raises issues of adequacy of representation
- Rule 23(c)(5) designed to cure problems of typicality and adequate representation due to divergence of interests among class members

I. Rule 23(c)(5) and the Use of Subclasses

Typical Uses:

- Class members seek different types of relief (i.e. injunction/monitoring v. damages)
- Factual differences exist in claims of distinct groups of class members
- Differences in state laws exist that vary substantive requirements of class members' claims

Pitfall:

- Large number of subclasses may defeat class certification requirement of predominance of common questions

I. Rule 23(c)(5) and the Use of Subclasses

Requirements:

- Each subclass must be headed by its own representative and satisfy Rule 23(a) and (b)

- Manual for Complex Litigation (4th ed.) ("MCL") § 21.26 provides that the judge must appoint one or more representatives of the class and any subclass

- MCL also states those "representatives must be free of conflicts and must represent the class adequately throughout the litigation. The judge must ensure that the representatives understand their responsibility to remain free of conflicts and to vigorously pursue the litigation in the interests of the class."

I. Rule 23(c)(5) and the Use of Subclasses

Subclasses and Adequacy of Representation:

- Presence of due process allows for the adjudication of rights of unpresent class members. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348 (2011) (class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only")

- Due process requires of adequacy of representation for all class members, including subclasses

I. Rule 23(c)(5) and the Use of Subclasses

Subclasses and Adequacy of Representation:

Class Representatives:

- Existence of named representative who shares same interest as unnamed class members designed to ensure vigorous pursuit of claims. *In re Literary Works in Elec. Database Copyright Litig.*, 654 F.3d 242, 249 (2d Cir. 2011) (named representative "must have an interest in vigorously pursuing the claims of the class"); *Hesse v. Sprint Corp.*, 598 F.3d 581, 589 (9th Cir.), *cert. denied*, 562 U.S. 1003 (2010) ("Class representation is inadequate if the named plaintiff fails to prosecute the action vigorously on behalf of the entire class or has an insurmountable conflict of interest with other class members.")

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I. Rule 23(c)(5) and the Use of Subclasses

Subclasses and Adequacy of Representation:

Legal Counsel:

- Rule 23(g) extends adequacy of representation to that of class counsel
- Due process requires that unpresent class members be represented by a zealous, conflict-free advocate. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 803 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 717-18 (6th Cir. 2013)
- MCL states general requirement that "[t]he judge must ensure that the lawyer seeking appointment as class counsel will fairly and adequately represent the interests of the class." MCL § 21.27
- MCL also states that "[i]f the certification decision includes the creation of subclasses reflecting divergent interests among class members, each subclass must have separate counsel to represent its interests." MCL §21.27, *citing* Fed. R. Civ. P. 23(g)(1)(A) committee note

Relevant Supreme Court Cases:

United States Parole Commission v. Geraghty, 445 U.S. 388 (1980)

Civil rights case where prisoner challenged parole procedures on his own and other prisoners' behalf. Class certification denied due to lack of typicality and to existence of individual issues. Affirming the Third Circuit's reversal of dismissal, the Supreme Court held that district court upon remand to consider whether subclassing was proper. It also ruled that a court need not consider subclassing sua sponte.

Relevant Supreme Court Cases:

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997)

Asbestos liability case involving settlement class of individuals (or their representatives) who had already filed asbestos-related claims and those who had not yet. There were also a variety of state law claims at issue. The Supreme Court reversed approval of the settlement class, finding the requirements of Rule 23(a) not met. Notable holdings:

- Class requirement of adequacy of representation "demand undiluted, even heightened, attention in the settlement context"
- Propriety of certification of settlement class not based solely upon fairness of the settlement
- Due process requires that "structural assurance[s] of fair and adequate representation for the diverse groups and individuals" within the class exist
- Use of subclasses to ensure adequacy of representation may have been remedy: "adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups."

Relevant Supreme Court Cases:

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999)

Another asbestos case involving certification of a settlement class. Three categories of class members were present: (i) those who had not yet sued or settled; (ii) those who had dismissed their claims but retained right to bring future actions; and (iii) past, present and future relatives of exposed persons. It was argued that class treatment was necessary to ensure sufficient insurance funds to pay claims. Supreme Court reversed certification of settlement class and approval of settlement as fair. Notable holdings:

- Reiterated that fairness of settlement was not substitute for adequacy of representation
- Structural protections of subclasses were necessary to ensure adequate representation of all class members

II. Rule 23(c)(4) and the Use of Issue Classes

Rule 23(c)(4) provides

"[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues."

- Envisions use of class action treatment for a portion of the case only
- Bifurcated trial with common issues tried first followed by individual trials on non-common issues such as proximate cause and damages
- Possible tool to overcome defense argument against class certification that common questions do not predominate over individualized ones as required by Rule23(b)(3)

II. Rule 23(c)(4) and the Use of Issue Classes

Typical Uses:

- Most common use is to certify class treatment on liability issues and then allow for separate hearings for individual class members to prove damages

Advantages:

- Allows for economies of class action treatment for part of case

Requirements:

- MCL states that "[c]ertification of an issues class is appropriate only if it permits fair presentation of the claims and defenses and materially advances the disposition of the litigation as a whole. If the resolution of an issues class leaves a large number of issues requiring individual decisions, the certification may not meet this test." MCL, § 21.24.
- Products-liability cases have split in circuits whether questions regarding product defects can be certified as issues class

Notable Supreme Court Case

Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013)

Antitrust class action case that made certification of comprehensive liability and damages class potentially more difficult. The Supreme Court rejected certification of class due to issues with trial court's consideration of provability of damages on class-wide basis. But Court did not hold that damages must be provable on class-wide basis to meet predominance requirement. Language in dissent suggested that issues class may be possible solution, stating "at the outset, a class may be certified for liability purposes only [under Rule 23(c)(4)], leaving individual damages calculations to subsequent proceedings." *Id.* at 1436-37.

Subsequent case adopting dissent approach: *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014)

- Sixth Circuit certified issues-only class with respect to consumer class liability issue

Courts Vary in Receptivity to Issue-Class Certification

- Strict view – Fifth Circuit

  Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996)

  Class must still meet predominance requirement as to case as a whole, not just the issues within an issues class. Based upon view that otherwise Rule 23(c)(4) would allow plaintiffs to "manufacture predominance through the nimble use of subdivision (c)(4)" and would result in "automatic certification in every case where there is a common issue." *Id.* at 745 n.21.

  Post-*Comcast* Fifth Circuit decision casts doubt upon Fifth Circuit's continued adherence to *Castano*:

  – *In re Deepwater Horizon*, 739 F.3d 790, 817 (5th Cir.), *cert. denied sub nom. BP Exploration & Production Inc., v. Lake Eugenie Land & Development, Inc.*, 135 S. Ct. 754 (2014), stating court agreed with its "fellow circuits" that "the rule of *Comcast* is largely irrelevant '[w]here determinations on liability and damages have been bifurcated' in accordance with Rule 23(c)(4)."

  – *See also Henke v. ARCO Midcon, L.L.C.*, 2014 WL 982777, at *21 (E.D. Mo. Mar. 12, 2014) (relying on *Castano* "absent authority within [the Eighth] Circuit's precedent indicating otherwise")

Courts Vary in Receptivity to Issue-Class Certification

- Liberal View - Second, Fourth, Seventh, and Ninth Circuits

  Certification of issues class permitted – perhaps encouraged – even where whole case does not meet predominance requirement

  – *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 230 (2d Cir. 2006); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 439 (4th Cir. 2003), *cert. denied*, 542 U.S. 915 (2004); *Butler v. Sears Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996)

- Middle View – Third Circuit

  Balancing approach. Must look at effect partial certification would have on class action's fair and efficient resolution as a whole.

  – *Gates v. Rohm and Haas Co., 655 F.3d 255, 272-73 (3rd Cir. 2011)*

Robinson+Cole

Managing Complex Class Litigation: Bifurcation

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Bifurcation in Class Actions

- Bifurcation / phasing of discovery – e.g., certification / merits

- Bifurcation / phasing of trial – e.g., liability / damages

Bifurcation of Discovery

- Rule 26(f)(3)(A): "A discovery plan must state the parties' views and proposals on: . . . (B) . . . whether discovery should be conducted in phases or be limited to or focused on particular issues"
- Rule 16(c)(2): "At any pretrial conference, the court may consider and take appropriate action on the following matters: . . . (F) controlling and scheduling discovery . . . (L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues . . . ."

Bifurcation of Discovery

- Rule 23(c)(1): "At any early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action."
- "Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial." Fed. R. Civ. P. 23(c)(1) advisory committee's note (2003).

Bifurcation of Discovery

- Manual for Complex Litigation (4th) § 11.213: "The court should ascertain what discovery on class questions is needed for a certification ruling and how to conduct it efficiently and economically. Consider also staying other discovery if resolution of the certification issue may obviate some or all further proceedings. Discovery may proceed concurrently if bifurcating class discovery from merits discovery would result in significant duplication of effort and expense to the parties."

Bifurcation of Discovery

- Manual for Complex Litigation (4th) § 21.14:
  - "Discovery relevant only to the merits delays the certification decision and may ultimately be unnecessary. Courts often bifurcate discovery between certification issues and those related to the merits of the allegations."
  - "Generally, discovery into certification issues pertains to the requirements of Rule 23 and tests whether the claims and defenses are susceptible to class-wide proof; discovery into the merits pertains to the strength or weaknesses of the claims or defenses and tests whether they are likely to succeed. There is not always a bright line between the two."

Bifurcation of Discovery

- Rule 26(b)(1) – proportionality
- Don't forget Rule 1 – rules intended "to secure the just, speedy and inexpensive determination of every action and proceeding"

Bifurcation of Discovery

- Case management decision, highly discretionary
- Use discovery topics from Rule 26(f) report, early discovery requests served by adversary
- Concrete examples – where to draw the line
- Where do class issues and merits overlap? Where is there no overlap?
- Don’t hamstring yourself
- Early discovery on named plaintiff’s claim?
- Phasing other than class vs. merits

Bifurcation of Discovery - Factors

- Expediency – time to resolve case / decide class certification
- Economy – save costs for litigants, judicial resources – e.g., if class certification denied or if class definition may narrow scope of merits discovery
- Severabililty – sufficiently clear dividing line between class and merits issues (or other proposed phasing)?

Bifurcation of Discovery Granted

- ***Harris v. comScore, Inc.*, 2012 U.S. Dist. LEXIS 27665, *1, 2012 WL 686709 (N.D. Ill. Mar. 2, 2012)**

- ***Physician Healthsource, Inc. v. Janssen Pharms., Inc.*, 2014 U.S. Dist. LEXIS 13523, *1 (D.N.J. Feb. 4, 2014).**

- ***Lake v. Unilever U.S., Inc.*, 964 F. Supp. 2d 893 (N.D. Ill. Aug. 7, 2013).**

Bifurcation of Discovery Denied

- ***City of Pontiac Gen. Employees' Ret. Sys. v. Wal-Mart Stores, Inc.*, 2015 U.S. Dist. LEXIS 79392, *1 (W.D. Ark. Jun. 18, 2015).**
- ***Copher v. Bank of Am., N.A.*, 2014 U.S. Dist. LEXIS 54089, *1 (W.D. Okla. Apr. 18, 2014).**
- ***Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, 2016 U.S. Dist. LEXIS 116970, *1 (D.N.J. Aug. 3, 2016).**
- ***Mut. Minds, LLC v. Shelly*, 2017 U.S. Dist. LEXIS 32603, *1 (M.D. Pa. March 8, 2017).**
- ***In re Groupon Secs. Litig.*, 2014 U.S. Dist. LEXIS 26212, *1 (N.D. Ill. Feb. 24, 2014).**

Bifurcation at Trial

- Rule 42(b): “For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.”

Bifurcation at Trial

- Manual for Complex Litigation (4th) § 21.24: “An issues-class approach contemplates a bifurcated trial where the common issues are tried first, followed by individual trials on questions such as proximate causation and damages. A bifurcated trial must adequately present to the jury applicable defenses and be solely a class trial on liability. There is a split of authority on whether the Seventh Amendment is violated by asking different juries to decide separate elements of a single claim.”

Bifurcation at Trial

- Manual for Complex Litigation (4th) § 11.632: "Severance may permit trial of an issue early in the litigation, which can affect settlement negotiations as well as the scope of discovery. The court should balance the advantages of separate trials, however, against the potential for increased cost, delay (including delay in reaching settlement), and inconvenience, particularly if the same witnesses may be needed to testify at both trials. There is also the potential for unfairness if the result is to prevent a litigant from presenting a coherent picture to the trier of fact."
- Same jury should be used unless issues are "entirely unrelated."

Bifurcation at Trial - Factors

- Convenience
- Expedition, economy
- Trial to jury vs. judge
- Overlap in testimony / evidence
- Confusion of factfinder
- Potential for unfair advantage / prejudice
- Unnecessary delay (from either single trial or bifurcation)
- Same jury or separate juries; 7th Amendment issues

Bifurcation at Trial Granted

- ***Romero v. Fla. Power & Light Co.,*** **2012 U.S. Dist. LEXIS 76146, *1 (M.D. Fla. Jun. 1, 2012).**

- ***Murillo v. Coryell Cty. Tradesmen, LLC*****, 2017 U.S. Dist. LEXIS 98067, *2 (E.D. La. June 26, 2017).**

Bifurcation at Trial Denied

- ***Tex. Roadhouse, Inc. v. Tex. Corral Rests., Inc.,*** **2017 U.S. Dist. LEXIS 85351, *1 (N.D. Ind. Jun. 5, 2017).**
- ***Depomed Inc. v. Purdue Pharma L.P.,*** **2013 U.S. Dist. LEXIS 167630, *1 (D.N.J. Nov. 26, 2013)).**
- ***SMD Software, Inc. v. EMove, Inc.,*** **2013 U.S. Dist. LEXIS 105007, *1 (E.D.N.C. July 26, 2013).**

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Managing Complex Class Litigation: Leveraging Bifurcation, Bellwether Trial, Joinder, Subclasses and Issue Classes

Bellwether Trials

July 27, 2017

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Topics

- Procedure
- Current issues
- Practical considerations

Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972)

Typical Situation

- Multi-district litigation/consolidation
- Preliminary discovery (written discovery/fact sheets, etc.)
- Work with court to identify key issues
- Identify potential bellwether cases/trial pool
  - Representative plaintiffs/sufficient bellwethers
  - Identify common issues/may only try particular issues
  - Fast-track remaining discovery for selected cases

Suitable for Bellwether?

- Production liability
- Medical device
- Toxic tort
- Antitrust
- Victim compensation fund
- Human rights
- Cases with common liability or damage issues
- Bellwethers on rise (often difficult to certify classes, particularly nationwide)

Purposes

- Force parties to identify and organize issues, streamline later proceedings, develop case
- "A bellwether trial also allows a court and jury to give the major arguments of both parties due consideration without facing the daunting prospect of resolving every issue in every action . . . A bellwether trial allows each party to present its best arguments on these issues for resolution by a trier of fact." *In re Methyl Tertiary Butyl Ether (MTBE) Prods.*, 2007 WL 1791258, (S.D.N.Y. June 15, 2007)

Purposes

- Value/benchmark other similar cases/help potential settlements
- Understand strength/weakness of evidence and theories, along with cost and length of trial
  - Pre-trial issues too

Binding?

- *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 300 (5th Cir. 1998)
- Binding process generally rejected
  - *But see* Seyedfarshi, *Binding Bellwether Trials in Multidistrict Litigation and the Right to Jury Trial*, 17 T.M. Cooley J. Prac. & Clinical L. 295 (2016)

Class Action, CAFA, and Bellwethers

- Class defendant considerations
  - Rule 23(b)(3) predominance
  - Benefits of class proceedings?
  - No issue preclusion risk in class actions
  - Certify after multiple bellwether trials?
  - Pending motion to certify?
- *Dunson v. Cordis Corp.*, 854 F.3d 551 (9th Cir. 2017) (bellwether request insufficient to trigger CAFA)

No Uniform Rules

- "To obtain the most representative cases from the available pool, a judge should direct the parties to select test cases randomly or limit the selection to cases that the parties agree are typical of the mix of cases." – Manual for Complex Litigation (4th) § 22.315
- Courts may give parties control to design approach, particularly beyond case selection
- Balance big-enough sample against manageability

Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998)

- Parties must agree to trial in transferee district unless case filed (or re-filed) there
- 28 U.S.C. 1407
- Transferee court may still rule on dispositive motions and class certification motions
- Impact on case selection
- Alternatives?
- Waive rights?

Sampling

- "Whether the aim is discovery, settlement, or a test-case trial, any sample should be representative of the claims and claimants, taking into account relevant factors such as the severity of the injuries, the circumstances of exposure to the product or accident, the mechanisms of causation, the products and defendants alleged to be responsible, any affirmative defenses, and the applicable state law." – Manual for Complex Litigation (4th) § 22.81.

But How? (Pros and Cons)

- Plaintiffs' counsel
  - May select cases or determine structure
- Defense counsel
- Each side participates
- Judge
  - From proposed slate
  - Offer strikes
- Should be accepted by both sides to have value

Strategic Considerations

- Selection
  - "It is simply a trial of fifteen (15) of the 'best' and fifteen (15) of the 'worst' cases contained in the universe of claims involved in this litigation." *In re Chevron U.S.A., Inc.*, 109 F.3d 1016 (5th Cir. 1997)
- Timing of trials

For Random Selection

- Empirical analysis of bellwether selection processes
- "[W]e urge courts to employ random selection procedures where possible."
  - Brown et al., *Bellwether Trial Selection in Multi-District Litigation: Empirical Evidence in Favor of Random Selection*, 47 Akron L. Rev. 663 (2014)

Against Random Selection

- Not representative
- Right or wrong, lack of confidence
- "If cases are selected at random, there is no guarantee that the cases selected to fill the trial-selection pool will adequately represent the major variables" Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2348 (2008)

Hybrid/Multi-Step Approaches

- *In re: General Motors LLC Ignition Switch Litig.*, 2016 WL 1441804 (S.D.N.Y. Apr. 12, 2016)
  - Bellwether verdict just last week
- *In re: Benicar (Olmesartan) Prods. Liab. Litig.*, 2016 WL 1370998 (D.N.J. Apr. 6, 2016)

Impact of Voluntary Dismissal

- "Bell wanted to have his cake and eat it by withdrawing from a bellwether trial and then sitting back to await the outcome of another plaintiff's experience against the appellees." *In re FEMA Trailer Formaldahyde Prod. Liab. Litig.*, 628 F.3d 157(5th Cir. 2010)
- Other options

Bellwether Settlements

- *Stryker* Litigation
  - Individual mediation
  - Global settlement
- Benefits
- Role of judge
  - Zimmerman, *The Bellwether Settlement*, 85 Fordham Law Review 2275 (2017)

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