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Recent Developments in Issue Certification Under Rule 23(c)(4) Require Courts to Focus on Manageability of Complex Class Actions

By Rebecca S. Bjork

Attorneys who regularly represent clients in class action lawsuits are no doubt aware of the concept of ''issue certification'' under Fed. R. Civ. P. 23(c)(4), but it is less likely that they themselves have actually tried an issue under the rule.

That reality may soon change. Issue classes appear to be in ascendance after *Wal-Mart Stores, Inc. v. Dukes*.[1] As a result, both courts and commentators alike are asking a key question: When does a court's decision to certify a specific issue for class treatment constitute a sound use of the class action mechanism, and alternatively, when does it simply paper over underlying fissures in the cohesiveness of the class claims?

This article attempts to provide an answer by reviewing recent key examples of how courts are applying Rule 23(c)(4) to certify only certain issues for class treatment. In short, the circuits are split on how issue certification should be approached where it is likely that individual damages awards would be available to class members. In such cases, courts that are concerned about judicial efficiency and the ability to manage class action trials are more likely to deny requests for issue certification.

Background Regarding Rule 23 Requirements

The prerequisites for certifying a class action, spelled out in Rule 23(a), are well known. Courts must first conduct a ''rigorous analysis'' to determine whether the proposed class satisfies the requirements of numerosity, commonality, typicality, and adequacy.[2] If it does, the court then considers the type of class action requested by the plaintiff under Rule 23(b).

The choices roughly can be characterized as (1) a class action under Rule 23(b)(2), seeking injunctive and declaratory relief which would apply to all class members automatically once issued by a court; or (2) a class action under Rule 23(b)(3), where the court finds that common issues predominate over questions that affect only individual members, and a class action would be superior to individual actions, which would allow class members to opt out.[3]

[1] 564 U.S. —-, 131 S. Ct. 2541 (2011).

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[2] *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

[3] Rule 23(b)(1) authorizes a third type of class action, where there is an ''indivisible remedy'' such as a limited fund for paying any classwide relief (e.g., an insolvent defendant) or

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The key question at the certification phase, therefore, generally is whether a common question raised by a class action can be adjudicated on a classwide basis. In other words, the court must be satisfied that the issues raised as ''common'' by the named plaintiff can be tried ''in one stroke'' in light of the evidentiary record.[4] What makes a class action an efficient method to resolve the claims of numerous individual class members is, in reality, the presence of common *answers* that allow the fact finder to evaluate the named plaintiff's claims at one time. In a Title VII employment discrimination case, for example, this approach requires an examination of the ''reasons'' why particular decisions were made affecting an individual's employment situation.[5] The Supreme Court explained that those reasons would inevitably vary in a company where the only supposed ''common'' issue was to allow managers to exercise their subjective discretion when making pay and promotion decisions.[6]

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.''[7] It does not state when, in fact, such a decision might be appropriate. (And interestingly, neither the majority nor the dissenting opinions in *Wal-Mart* cite Rule 23(c)(4).) The manual published by the Federal Judicial Center to assist federal judges in managing complex cases—including class actions—explains that the rule ''permits a class to be certified for specific issues or elements of claims raised in the litigation.''[8] The approach is ''appropriate only if it permits fair presentation of the claims and defenses and materially advances the disposition of the litigation as a whole.''[9]

The American Law Institute explains that this is a higher burden to satisfy than the commonality prerequisite: ''[i]dentification of a common issue, the resolution of which will 'materially advance the resolution' of such claims, thus goes significantly beyond identification of the minimal commonality that is among the general requirements for certification of a class action'' under Rule 23.[10] And one must look to the substantive law to determine whether aggregation of such a common issue is even possible, since ''[s]ubstantive law defines the relationships among legal and factual issues—sometimes intertwining them and sometimes separating them cleanly so as to create a 'joint' at which aggregate treatment may carve.''[11] Issue certification is appropriate only where a trial can be held using evidence that will not compromise the ''ability of the defendant to dispute the allegations made by claimants or to raise pertinent substantive defenses.''[12]

Circuit Split Regarding Relationship Between Predominance, Issue Certification

The circuits differ on how they have treated issue certification in light of the predominance requirement of Rule 23(b)(3). In the Fifth Circuit, for example, Rule 23(c)(4) is considered a ''housekeeping'' mechanism available to the district court, but one that cannot circumvent the need for the plaintiffs' ''cause of action, as a whole,'' to satisfy the predominance requirement of Rule 23(b)(3). As that court colorfully explained, ''a district court cannot manufacture predominance through the nimble use of subdivision (c)(4).''[13]

The Second Circuit disagrees; there, ''courts may use subsection (c)(4) to single out issues for class treatment when the action as a whole does not satisfy Rule 23(b)(3).''[14] The Ninth Circuit sides with the Second.[15] The Third Circuit does not side with either of these positions, but rather has adopted a multi-factor balancing test.[16] The Sixth Circuit has approved the use of issues classes to bifurcate class trials into liability phases and damages phases.[17] The Fourth Circuit has acknowledged the split in approaches and has stated, ''we have no need to enter that fray,'' yet explained that the ''theory'' of the rule is that efficiency can be achieved by adjudicating certain common issues ''even though other issues in the case may have to be litigated separately by

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where the defendant is at risk of inconsistent adjudications regarding an institutional policy, which does not allow class members to opt out. Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 Cornell L. Rev. 1105 (2011) (discussing concept of indivisible remedy). This rule is infrequently invoked.

[4] *Wal-Mart*, 131 S. Ct. at 2551 (''Their claims must depend upon a common contention . . . [that] must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'')

The Supreme Court reaffirmed the importance of this notion of complete adjudication of classwide issues more recently in its decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). *See* Rebecca Bjork & Gerald L. Maatman, Jr., Comcast Is Decided (Seyfarth Shaw LLP Workplace Class Action Blog, Mar. 27, 2013), available at http://www.workplaceclassaction.com/class-certification/comcast-is-decided/.

[5] *Id.* at 2552.

[6] *Id.* at 2554 (''In such a company, demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's. A party seeking to certify a nationwide class will be unable to show that all the employees' Title VII claims will in fact depend on the answers to common questions.'').

[7] Fed. R. Civ. P. 23(c)(4).

[8] Manual For Complex Litigation (Fourth) § 21.24 (Federal Judicial Ctr. 2004) (citing *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177, 184 (4th Cir. 1993) (class certified for eight common issues); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472-73 (5th Cir. 1986) (class action to adjudicate ''state of the art'' defense in products liability class action).

[9] Manual for Complex Litigation, § 21.311.

[10] Principles Of The Law Of Aggregate Litigation § 2.02 cmt. a (Am. Law Inst. 2010).

[11] *Id.* § 2.02 cmt. d.

[12] *Id. See also id.* § 2.03 cmt. b (noting the ''significant limitation that the court should consider whether substantive law cleanly separates the common issue from remedial questions and from other issues concerning liability. Class-action treatment of a common issue would not materially advance the resolution of related claims when that common issue remains intertwined under applicable substantive law with other issues that are not common, including individualized defenses.'').

[13] *Castano v. Am. Tobacco*, 84 F.3d 734, 745 n.21 (5th Cir. 1996).

[14] *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006).

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

[16] *See Gates v. Rohm & Haas*, 655 F.3d 255, 272 (3d Cir. 2011).

[17] *See Olden v. LaFarge Corp.*, 383 F.3d 495, 509 (6th Cir. 2004).

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each class member.''[18] The Eighth Circuit likewise has not taken a position.[19]

In light of this unsettled law, it is clearly important now for class action attorneys and businesses facing such lawsuits to understand how courts are applying Rule 23(c)(4) to create issues classes.

Contours of Courts' Application of Rule 23(c)(4) Since *Wal-Mart v. Dukes*

Recent developments in class action law have served to make issue certification a more attractive option for named plaintiffs seeking to advance to the class certification phase of their cases. *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*[20] is a primary example. There, the Seventh Circuit reversed a decision denying class certification, holding that issue certification is appropriate to determine: (1) whether Merrill Lynch's teaming and account distribution policies had a disparate impact on African American financial advisors; and (2) if so, whether it is nonetheless justified by business necessity.[21] In that case, the plaintiffs sought injunctive relief under Rule 23(b)(2) only, not money damages which are not even available under a disparate impact theory.[22]

The Court of Appeals still found that issue certification was appropriate, even though ''[o]bviously a single proceeding, while it might result in an injunction, could not resolve class members' claims. Each class member would have to prove that his compensation had been adversely affected by one or both of the practices and if so what loss he sustained—and remember that the class has 700 members.''[23]

As for money damages (e.g., backpay awards, compensatory damages, punitive damages), the Seventh Circuit explained that if the district court found there are no common issues to be tried on that issue, then ''the next stage of the litigation, should the classwide issue be resolved in favor of the plaintiffs, will be hundreds of separate suits'' and that because financial advisors each earn more than $100,000 a year, ''the stakes in each of the plaintiffs' claims are great enough to make individual suits feasible.''[24] In those suits, at least, the question of whether Title VII has been violated by Merrill Lynch will be settled through preclusion and will not need to be ''determined anew in each case.''[25]

In *Puffer v. Allstate Ins. Co.*,[26] the Seventh Circuit provided some further guidance to courts considering issue certification. There, the panel reviewed the district court's denial of class certification in a Title VII case where the plaintiff alleged that processes for setting salaries had a disparate impact on female managers. The intervenors who appealed argued that the common issue of ''liability''—whether the salary administration process had an adverse impact on women, and was not justified by business necessity or operated to institutionalize past discrimination—could be certified separately under Rule 23(c)(4). The Seventh Circuit agreed with the district court, albeit in dicta, since it had found that the argument had been waived below.[27]

Developments in the Second Circuit are interesting to follow in light of its history of case law favoring the use of the class certification mechanism. In *United States & The Vulcan Society v. The City of New York*,[28] for example, the court revisited its certification of a class action for the liability phase of a suit challenging hiring tests used to select entry-level firefighters for the city. The Department of Justice and a group of intervenors contend those tests have a disparate impact on African-American and Hispanic applicants.[29] After the ruling in the *Wal-Mart* case, the city moved for decertification, arguing that decision unequivocally precluded certification of a class under that rule for remedies that included backpay and benefits and compensatory damages.[30] While the plaintiff-intervenors conceded that the class could no longer be certified under that rule, they argued instead that it met the requirements of Rule 23(b)(3).[31]

The court analyzed the Second Circuit's leading precedent on class certification in employment discrimination cases, *Robinson v. Metro-North Commuter Railroad Co.*,[32] in light of the Supreme Court's abrogation of parts of that decision in *Wal-Mart*.[33] Acknowledging the significance of that ruling, the court explained that ''[a]fter *Wal-Mart*, it is clear that claims for neither backpay nor compensatory damages may be certified for class treatment under Rule 23(b)(2), at least where those claims are more than wholly incidental to the injunctive relief sought by the class.''[34] However, the court then relied on Rule 23(c)(4) to conclude that its initial order bifurcating the case into a ''liability phase'' and a ''remedial phase'' under Rule 42(b),[35] coupled with the fact that the ''Second Circuit has consistently endorsed a broad reading of Rule 23(c)(4),''[36] meant that the certification order should stand. The court ex-

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

[19] *See In re St. Jude Medical, Inc.*, 522 F.3d 836, 841 (8th Cir. 2008).

[20] 672 F.3d 482 (7th Cir. 2012).

[21] *McReynolds*, 672 F.3d at 489 (''whether . . . [the teaming policy] causes racial discrimination and whether it nonetheless is justified by business necessity are issues common to the entire class and therefore appropriate for classwide determination'').

[22] *Id.* at 484, 491.

[23] *Id.* at 490-91. In a very unusual move, the Seventh Circuit in *McReynolds* itself ordered certification of the issue of whether the challenged practices were unlawful, instead of remanding to the district court the question of whether that should be done in light of the evidentiary record and the Seventh Circuit's instructions. *See McReynolds*, 672 F.3d at 492 (''We have trouble seeing the downside of the limited class action treatment that we think would be appropriate in this case.'').

[24] *Id.* at 492.

[25] *Id.*

[26] 675 F.3d 709 (7th Cir. 2012).

[27] *See id.* at 720 (''individual issues would certainly predominate at the damages phase. Bifurcation of the liability and damages phases under Rule 23(c)(4) would not resolve this concern because intervenors have not established that a uniform policy caused the disparity.'').

[28] 276 F.R.D. 22 (E.D.N.Y. 2011).

[29] *Id* at 28 (noting that in 2009, the court had certified a liability-phase class under Fed. R. Civ. P. 23(b)(2)).

[30] *Id.* at 27-28.

[31] *Id.* at 28.

[32] 267 F.3d 147 (2d Cir. 2001).

[33] *See City of New York*, 276 F.R.D. at 31-32.

[34] *Id.* at 33.

[35] *Id.* at 31.

[36] *Id.* at 33.

plained, ''[i]ssue certification of bifurcated liability-phase questions is fully consistent with *Wal-Mart*'s careful attention to the distinct procedural protections attending (b)(2) and (b)(3) classes.''[37] Because Rule 23(b)(2) classes arise where an injunction provides indivisible relief to all class members at once, and because in a disparate impact case, ''[t]he initial classwide phases of a disparate impact claim similarly focus on the defendant's employment actions vis-à-vis the protected group as a whole[,]'' the bifurcated class certification order entered for liability purposes was not affected by *Wal-Mart*.[38]

The court next explained that ''individual issues arise in disparate impact and pattern-or-practice disparate treatment cases only if the class establishes the employer's liability and the litigation proceeds to the remedial phase.''[39] Through this analysis, the court decided that its liability phase class certification order under Rule 23(b)(2) and 23(c)(4) survives *Wal-Mart*.[40]

The court concluded, ''even where class plaintiffs file a complaint seeking non-incidental individual monetary relief, the classwide liability questions raised by their disparate impact and pattern-or-practice disparate treatment claims are properly certified under Rule 23(b)(2) and (c)(4).''[41] It went on to analyze whether compensatory damages could be determined on a classwide basis as the intervenors argued, and found they could not, even though some issues that would form the logical predicate for making compensatory damages awards would be common issues that can be certified (such as the characteristics of a New York firefighter's job).[42]

Finally, the court also determined that the claims of two subclasses—the ''non-hire victim'' and the ''delayed-hire victim'' subclasses—should be certified under Rule 23(b)(3) and (c)(4) because ''[e]ven though individual proceedings will be necessary to determine a particular claimant's eligibility to receive individual relief and what relief is available,'' along with whether they mitigated their losses and the city's actions caused compensable noneconomic losses, the resolution of those individual questions ''is of relatively minimal significance to the litigation as a whole.'' [43]

Janes v. Triborough Bridge and Tunnel Authority[44] is another good example of how courts in the Second Circuit are applying Rule 23(c)(4) liberally to grant issue certification. The plaintiffs sought certification of a class of certain residents of New Jersey and New York under Rule 23(b)(2) or Rule 23(b)(3) or a hybrid of both, seeking restitution and injunctive relief for alleged violations of their constitutional rights by virtue of the fact that they were charged more to use the Triborough bridges than other residents of New York.[45] While the defendant did not contest that the named plaintiffs satisfied the requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy—it argued that certification for restitution under Rule 23(b)(2) was foreclosed by *Wal-Mart*, and the court agreed because individual inquiries into where class members lived and how often they drove over the bridges into the city would be required.[46]

The court did, however, rule that an issues class under Rule 23(c)(4) would be appropriate under Rule 23(b)(2) for the ''merits of Plaintiffs' constitutional claims, and the attendant injunctive and declaratory relief they seek[.]''[47] The court then considered whether the plaintiffs' state law claims for unjust enrichment and money had and received (the ''vehicle for the money damages they seek''),[48] could be certified under Rule 23(b)(3). It concluded that because those claims could not proceed absent a finding of liability on the constitutional claims, bifurcation under Rule 42(b) into a ''liability'' phase and a ''state law damages'' phase would save substantial time and expense.[49] If the defendant prevailed on the constitutional question, the state law claims would not need to be tried.[50] If the plaintiffs were to prevail at the liability phase, only then would the court conduct the predominance and superiority analysis required by Rule 23(b)(3) to certify a remedies class.[51]

Looking at other circuits, the pragmatic realities of how class cases can be tried tend to drive courts' determination of whether to certify issues classes. Some courts have placed a burden on a plaintiff seeking to use Rule 23(c)(4) to provide a specific proposal for how

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[37] *Id.* at 34.
[38] *Id.*
[39] *Id.*
[40] In a very interesting subsequent decision, the Second Circuit made clear that in defending itself on the issue of whether the City is liable under Title VII, it need not rely solely on statistical proof (or challenges to the statistical proof offered by the plaintiff or intervenors) but can introduce evidence of its attempts to recruit minorities, promote diversity in its firefighter workforce, and create a hiring screen that does not have a disparate impact on racial minorities. *See* Rebecca Bjork & Gerald L. Maatman, Jr., Second Circuit Pronounces New View Of The Importance Of Statistical Evidence In Firefighter Hiring Litigation In *United States and The Vulcan Society, Inc., et al. v. City Of New York, et al.* (Seyfarth Shaw LLP Workplace Class Action Blog, May 15, 2013), available at http://www.workplaceclassaction.com/class-certification/second-circuit-pronounces-new-view-of-the-importance-of-statistical-evidence-in-firefighter-hiring-l/.
[41] *City of New York*, 276 F.R.D. at 35.
[42] *Id.* at 45.
[43] *Id.* at 48, 49.
[44] No. 06 Civ. 1427 (BSJ) (HBP), 2011 BL 382230 (S.D.N.Y. Oct. 5, 2011).
[45] *Janes*, 2011 BL 382230, at *2.
[46] *Id.* at *5.
[47] *Id.* at *6.
[48] Id.
[49] *Id.*
[50] *Id.*
[51] *Id.* at *7. *See also Gulino v. Bd. of Educ. of the City School Dist. of the City of New York*, No. 96 Civ. 8414 (KMW), 2012 BL 316576, at *11 (S.D.N.Y. Dec. 5, 2012) (noting *Wal-Mart* did not address Rule 23(c)(4) and explaining that bifurcation of liability and remedial classes is favored) (collecting cases). As these cases reveal, the Second Circuit's approach to issue certification is more welcoming than the Fifth Circuit's, and district court decisions reflect that split. *See Morangelli v. Chemed Corp.*, 275 F.R.D. 99 (E.D.N.Y. 2011), *recon. granted in part on other grounds*, 275 F.R.D. 99 (E.D.N.Y. July 8, 2011) (granting certification of FLSA nationwide class action by severing ''liability'' from ''damages,'' and certifying the liability issue under Rule 23(b)(3) and (c)(4) because under Second Circuit precedent, ''[c]ommon issues may predominate when liability can be determined on a classwide basis, even when there are some individualized damage issues'' (quoting *In re Visa Check/Mastermoney Antitrust Litig.* 280 F.3d 124, 139 (2d Cir. 2001)).

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the issue to be tried on a classwide basis can be separated out from other issues.[52] Others have analytically focused on what a jury verdict form would look like, as a mechanism for guiding the court's determination of whether certifying an issues class would efficiently resolve enough of the litigation to justify certification.[53]

Constitutional questions, in particular, have been found to be appropriate for issue certification.[54] Where, however, the constitutional inquiry itself is enmeshed in facts that conceivably vary from class member to class member, issue certification has been denied.

In *Daskalea*, for example, the court considered and denied the plaintiff's request for issue certification in a case where it was alleged that the Humane Society in the District of Columbia had violated the due process clause of the U.S. Constitution in its interactions with pet owners. It did so because ''the very heart of Plaintiffs' claims'' would vary from person to person, since deciding liability would require the court to analyze the private interest that was affected by the public action, and a wide range of alleged deprivations were alleged (some had their pets taken against their will, other pets were destroyed and others merely detained them, some were forced to undergo unwanted medical treatment, etc.).[55]

However, where bifurcation of a class action into a ''liability'' phase followed by a ''remedial'' phase (if the plaintiffs prevail in phase one) is possible, some courts have decided to at least dip their toes into issue certification, at times leaving difficult questions open for later determination.[56]

Other courts have disagreed, finding that an issues class would not create any efficiencies to advance the resolution of the litigation. This occurs most often where liability itself cannot be determined absent individualized analyses of each class members' situation.[57] Some courts expressly relate this problem to the issue of superiority, determining whether the class members' claims can be tried efficiently on a class basis.[58]

Conclusion

While the use of Rule 23(c)(4) by federal courts to certify specific issues for classwide adjudication is certainly not a new invention, it is clear that it is becoming more prevalent. Class action law continues to evolve at a rapid pace, as the Supreme Court's recent precedents are interpreted and implemented by the lower courts.

Practitioners of class action law, and companies impacted by class actions, should focus particular attention on issue certification in the months to come, as it is likely to become a major new area of litigation.

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[52] *See, e.g., Daskalea v. Wash. Humane Soc'y*, 275 F.R.D. 346, 369, n.22 (D.D.C. 2011).

[53] *See, e.g., In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, MDL No. 1967, Master Case No. 08-1967-MD-W-ODS, 2011 BL 323743, at *9 (W.D. Mo. Dec. 22, 2011) (''And what precise questions will the jury answer? Even if the jury finds a defendant had 'knowledge' of the scientific debate [over the safety of BPA], that in itself proves little. . . . Without more specificity, the verdict form becomes increasingly complex.'').

[54] *See, e.g., Estate of Vandam v. Daniels*, 278 F.R.D. 415, 426-27 (S.D. Ind. 2011) (noting Seventh Circuit's guidance that where constitutional inquiries are required, ''it makes good sense'' to resolve them on a class basis leaving individualized issues to ''individual follow-on proceedings'' (quoting *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 911 (7th Cir. 2003)); *Miri v. Dillon*, No. 11-CV-15248, 2013 BL 127386, at *12 (E.D. Mich. May 14, 2013) (''considering the nature of Plaintiffs' and the putative class members' identical Fourth Amendment claim, if Plaintiffs establish liability as to one class member, it will succeed in establishing liability as to all other class members'').

[55] *Daskalea*, 275 F.R.D at 361.

[56] *See, e.g., In re Titanium Dioxide Antitrust Litig.*, 284 F.R.D. 328, 348-49 (D. Md. 2012) (''numerous individual questions of damages'' do not defeat certification and ''one or more of the above-listed methods [including Rule 23(c)(4)] may need to be utilized as this case progresses''); *Carroll v. Stettler*, No. 10-2262, 2011 BL 269910 (E.D. Pa. Oct. 19, 2011) (certifying six separate issues pertaining to the defendants' liability to the named plaintiffs who claimed they lost their investments through a Ponzi scheme even though individualized damages calculations would be required); *Easterling v. State of Connecticut Dep't of Correction*, 278 F.R.D. 41, 47 (D. Conn. 2011) (in Title VII sex discrimination class action, denying defendant's motion to decertify class certified under Rule 23(b)(2), and instead modifying the earlier certification order ''to include only the issues of the defendant's liability and the plaintiff's claims for classwide declaratory and injunctive relief,'' and taking '' 'full advantage' of Rule 23(c)(4)'' to do so while also certifying a Rule 23(b)(3) class for individualized monetary relief (quoting *Robinson*, 267 F.3d at 167)).

[57] *See, e.g. Clark v. Prudential Ins. Co. of Am.*, 08-CV-6197, 2013 BL 104193, at *6 (D.N.J. Apr. 18, 2013) (''the individualized issues which arise in the calculation of damages in fact are so inextricably linked that bifurcation would be judicially inefficient''); *In re BPA*, 2011 BL 323743, at *9 (in multidistrict proceeding regarding allegations that plastic manufacturers violated state consumer protection law by selling sippy cups and baby bottles containing BPA, denying, inter alia, motion for class certification under Rule 23(c)(4) where ''key questions regarding liability, such as consumers' knowledge of BPA before purchasing products and their extent of using the products, will be left unanswered even after a trial on the four [common] issues'' identified by the court in a previous Rule 23 Order); *Moeller v. Taco Bell Corp.*, No. C 02-5849 PJH, 2012 BL 189516, at * 5 (N.D. Cal. July 26, 2012) (denying issue certification where plaintiffs brought state law claims for damages due to allegedly inaccessible restaurant facilities because those claims depended on proof of denial of access ''on a particular occasion'' and ''[e]ach class member must show how he or she was personally affected.'') .

[58] *See, e.g., Casida v. Sears Holdings Corp.*, No. 11-cv-01052 AWI JLT, 2012 BL 200661, at *23 (E.D. Cal. Aug. 8, 2012) (denying issue certification because ''a class action would be impractical and unmanageable and would not promote judicial economy'').