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DO ANY OF THE DEFENDANT'S DEFENSES REQUIRE PLAINTIFF-SPECIFIC PROOF?

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Affirmative defenses and the individual issues raised by them are rarely enough, standing alone, to defeat class certification. In *Tyson Foods, Inc. v. Bouaphakeo* (2016), the Supreme Court put it this way: "When '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.'"

There are exceptions, however. In *Stuart v. Global Tel*Link Corp.*, 956 F.3d 555 (8th Cir. 2020), the Eighth Circuit affirmed the decertification of a class claim for unjust enrichment based on the voluntary payment doctrine, explaining that this affirmative defense "would require an individualized inquiry into the subjective thinking of each user of inmate calling services every time he or she made a call."

Likewise, in *True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923 (9th Cir. 2018), the Ninth Circuit affirmed the denial of class certification due to the individualized nature of the defendant's consent defense to a TCPA claim, which turned on "individual communications and personal relationships." *See also Cruson v. Jackson Nat'l Life Ins. Co.* (5th Cir. 2020) (reversing certification due to district court's failure to correctly assess the effect of the defendant's affirmative defenses of waiver and ratification on the question of predominance).

In the products liability context, the Eleventh Circuit's decision in *Brown v. Electrolux Home Products, Inc.*, 817 F.3d 1225 (11th Cir. 2016), offers a good example of how affirmative defenses can affect the predominance inquiry. That action was one of many complaining of smelly washing machines. Front-loading machines have a rubber seal called a bellows, and early models had a "convoluted" bellows. The class complaint alleged that this type of bellows trapped water, allowing mildew to grow, resulting in stained and smelly clothes. The defendant's written warranty excepted damage from "misuse," and the defendant raised misuse as an affirmative defense. The district court discounted the defendant's argument that resolving this affirmative defense required individualized proof, instead pointing to the general proposition that unique affirmative defenses rarely preclude certification. The Eleventh Circuit reversed, explaining as follows:

> What matters is the type of evidence that the parties will submit to prove and disprove the defense. Here, Electrolux will need to prove that the mildew in the washing machines arose from the class members' misuse. That showing will require individual proof.

The Eleventh Circuit remanded the case for further proceedings, noting that "[i]ndividual affirmative defenses can defeat predominance in some circumstances. For example, the affirmative defenses could apply to the vast majority of class members and raise complex, individual questions." In this circumstance, the district court had "too hastily concluded" that several questions were common to the class.

In summary, courts are reluctant to deny certification when the sole obstacle is an affirmative defense, especially one that applies only to some class members. But when the affirmative defense is truly important to the resolution of the claims of the class members, or a significant portion of them, and addressing the defense will require individualized proof, the defense alone can defeat certification and, short of that, can be a very significant factor in the predominance analysis.