



THE IMPACT OF INDIVIDUAL DAMAGES ISSUES ON CLASS CERTIFICATION AFTER *COMCAST CORP. V. BEHREND*

by Felix Shafir

Federal Rule of Civil Procedure 23(b)(3) permits federal courts to certify class actions that seek monetary relief. Plaintiffs have long argued that class treatment is appropriate under this provision even where numerous mini-trials would be necessary to resolve damages issues. Federal circuit court decisions have supported this position. But *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), may have changed the legal landscape by proscribing class certification where individualized damages issues predominate over common questions.

Background

Rule 23(b)(3) allows for class certification solely where “questions of law or fact common to class members predominate over any questions affecting only individual members” and a class action would be “superior to other available methods for fairly and efficiently adjudicating the controversy.” FED. R. CIV. P. 23(b)(3).

Before *Comcast*, federal circuit courts had held that Rule 23(b)(3)’s “predominance requirement is satisfied despite the need to make individualized damage determinations.” 2 William B. Rubenstein, *NEWBERG ON CLASS ACTIONS* § 4:54 (5th ed. 2013). This interpretation of the predominance requirement, however, is on shaky ground after *Comcast*.

The district court in *Comcast* certified a class of cable-television subscribers who sought damages for alleged violations of federal antitrust laws, and the U.S. Court of Appeals for the Ninth Circuit affirmed. But the U.S. Supreme Court reversed, holding that the action was improperly certified for class treatment under Rule 23(b)(3) because the plaintiffs failed to show the requisite predominance. *Comcast Corp.*, 133 S. Ct. at 1432-35.

Justice Scalia’s majority opinion emphasized that courts have a “duty to take a ‘close look’ at whether common questions predominate over individual ones,” and held that the predominance requirement cannot be satisfied where “[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class.” *Id.* at 1432-33. *Comcast* determined that individualized damages issues will invariably predominate over common questions if a plaintiff fails to establish that “damages are capable of measurement on a classwide basis.” *Id.* at 1433. Since the plaintiffs’ damages model fell short of meeting this standard, *Comcast* concluded that the plaintiffs had not satisfied the predominance requirement. *Id.*

Justices Ginsburg and Breyer—joined by Justices Kagan and Sotomayor—jointly dissented, concluding that the plaintiffs’ damages model “could measure damages suffered by the class.” *Id.* at 1440. The dissent also insisted the majority’s opinion could not be “read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable ‘on a class-wide basis.’” *Id.* at 1436. According to

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the dissent, this was so because the plaintiffs never challenged “the need to prove damages on a classwide basis through a common methodology.” *Id.* at 1437. Thus, in the dissent’s view, the majority opinion was dependent on the plaintiffs’ “absence of contest” on this key issue and the majority’s “ruling is good for this day and case only,” such that “individual damages calculations do not preclude class certification.” *Id.* at 1436-37.

The Split of Authority over Comcast’s Impact

Several federal courts have held that, under *Comcast*, Rule 23(b)(3)’s predominance requirement cannot be satisfied where individualized damages issues predominate over questions common to the class. *See, e.g., Bright v. Asset Acceptance, LLC*, 292 F.R.D. 190, 202-03 (D.N.J. Aug. 1, 2013).¹ Likewise, “[c]ommon questions of fact cannot predominate where there exists no reliable means of proving classwide injury,” and therefore, “[w]hen a case turns on individualized proof of injury, separate trials are in order.” *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252-53 (D.C. Cir. 2013).

But other courts, applying at least three different analytical approaches, have disagreed with the view that individualized damages issues preclude class certification under *Comcast*. *See Jacob v. Duane Reade, Inc.*, 2013 WL 4028147, at *3-7 (S.D.N.Y. Aug. 8, 2013).

First, several courts maintain that *Comcast* “does not infringe on the long-standing principle that individual class member damage calculations are permissible in a certified class under Rule 23(b)(3).” *See, e.g., Munoz v. PHH Corp.*, 2013 WL 2146925, at *24 (E.D. Cal. May 15, 2013).

Other courts have granted class certification after *Comcast* where plaintiffs merely asserted that they have a “viable theory of how to calculate damages” on a classwide basis, reasoning that, should individualized damages issues “later predominate,” courts could subsequently address those concerns “at that time.” *Thurston v. Bear Naked, Inc.*, 2013 WL 5664985, at *10 (S.D. Cal. July 30, 2013).

Still other courts rely on so-called “issue” certification to circumvent *Comcast*. *See, e.g., Butler v. Sears, Roebuck and Co.*, 727 F.3d 796, 799-801 (7th Cir. 2013). Utilizing Rule 23(c)(4)—which provides that “an action may be brought or maintained as a class action with respect to particular issues” when “appropriate”—courts adopting this approach hold that, even where “damages are too individualized” to justify class treatment for a damages class, courts may nonetheless “certify [an issue] class as to liability, but not as to damages, . . . so long as the proposed liability class meets the requirements of Rule 23(a) and (b).” *Jacob*, 2013 WL 4028147, at *6 n.3 & *11.

In short, federal courts construing *Comcast* have articulated inconsistent views as to whether, and under what circumstances, individualized damages issues preclude class certification. *See id.* at *3.

The Drawbacks of the Seventh Circuit’s Illustrative Approach to Comcast

Some commentators have suggested that issue certification “may become a common approach for courts grappling with the reach and effect of *Comcast*.” *Id.* at *7. The Seventh Circuit’s recent decision in *Butler v. Sears, Roebuck and Co.* aptly illustrates this approach, including the potential analytical flaws that may persuade other federal courts—and perhaps even the U.S. Supreme Court—to reject this approach in the future.

¹ *Accord, e.g., Fernandez v. Wells Fargo Bank, N.A.*, 2013 WL 4540521, at *14-15 (S.D.N.Y. Aug. 28, 2013); *Wheeler v. United Servs. Auto. Ass’n*, 2013 WL 4525312, at *4-5 (D. Alaska Aug. 27, 2013); *Seabron v. Am. Family Mut. Ins. Co.*, 2013 WL 3713652, at *9 (D. Colo. July 16, 2013); *Martin v. Ford Motor Co.*, 292 F.R.D. 252, 274-77 (E.D. Pa. July 2, 2013); *Cowden v. Parker & Assocs.*, 2013 WL 2285163, at *6-7 (E.D. Ky. May 22, 2013); *Forrand v. Fed. Express Corp., Inc.*, 2013 WL 1793951, at *3-5 (C.D. Cal. Apr. 25, 2013); *Roach v. T.L. Cannon Corp.*, 2013 WL 1316452, at *3-5 (N.D.N.Y. Mar. 29, 2013).

According to the Seventh Circuit, “[i]f the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses,” then individualized damages issues “should not preclude class certification.” *Butler*, 727 F.3d at 801. Applying this issue certification standard, *Butler* held that “a class action limited to determining liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members, or homogeneous groups of class members, is permitted by Rule 23(c)(4).” *Id.* at 800.

The Seventh Circuit reached this conclusion based primarily on three sources of authority: (1) pre-*Comcast* case law permitting class certification notwithstanding individualized damages issues; (2) an Advisory Committee Note to Rule 23(b)(3) dating back to 1966; and (3) Rule 23(c)(4). *See id.* at 800-01. But the court’s reliance on these authorities may be misplaced.

First, pre-*Comcast* federal circuit court decisions allowing claims to be certified for class treatment irrespective of individualized damages issues may no longer be good law. While the dissent in *Comcast* emphasized that lower courts had permitted class certification regardless of “individual damages calculations,” *Comcast*, 133 S. Ct. at 1437, neither the dissent nor the Seventh Circuit in *Butler* identified any U.S. Supreme Court decision adopting such a rule.

Comcast did not follow this lower court standard, with its back-of-the-hand treatment for individualized damages issues. Instead, the U.S. Supreme Court held that Rule 23(b)(3)’s predominance requirement can be satisfied only if “damages are capable of measurement on a classwide basis” because, otherwise, “[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class” and render class certification improper. *Id.* at 1433. This is precisely why, unlike the Seventh Circuit in *Butler*, several federal courts have refused to certify classes under Rule 23(b)(3) where individualized damages issues overwhelmed common questions. *See, e.g., Bright*, 292 F.R.D. at 202-03.

As the D.C. Circuit has recognized, “case law was far more accommodating to class certification under Rule 23(b)(3)” before *Comcast*, and lower “courts had not treated [*Comcast*’s] principle as intuitive in the past.” *Rail Freight*, 725 F.3d at 255. Such accommodating lower court decisions will not survive if they cannot be squared with the high court’s interpretation of Rule 23(b)(3)’s predominance requirement in *Comcast*.

These pre-*Comcast* decisions could be especially vulnerable in light of *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011), which rejected the notion that defendants could be deprived of their right to litigate “defenses to individual claims” in class actions through the use of a “Trial by Formula.” As one court recently put it, *Comcast*, read together with *Wal-Mart*, “instructs courts that the method by which ... damages are calculated may not serve as an afterthought in the class certification analysis, as whenever damages calculations require significant degrees of individualized proof, defendants are entitled to respond to and address such variances—in fact, due process requires it.” *Jacob*, 2013 WL 4028147, at *15. Thus, *Comcast* and *Wal-Mart* may sweep away pre-*Comcast* lower court decisions that brush individualized damages concerns aside as an afterthought in the class certification analysis.

Second, the Advisory Committee Note to Rule 23(b)(3) from 1966 may also fail to support efforts to sidestep *Comcast*. An Advisory Committee Note cannot trump the plain text of Rule 23. *See Wal-Mart Stores, Inc.*, 131 S. Ct. at 2559 (“Rule [23] itself, not the Advisory Committee’s description of it, . . . governs”). Rule 23(b)(3)’s predominance requirement states that class certification is appropriate solely where “questions of law or fact common to class members predominate over any questions affecting only individual members.” Thus, whatever the Note says, it may not suffice to exempt damages issues from the predominance requirement given that the plain language of Rule 23(b)(3) includes no such exemption and instead requires common questions to predominate over “any” individual questions.

Finally, issue certification under Rule 23(c)(4) may not permit courts to circumvent *Comcast*. The propriety of this procedure “remains a shifting reality” because lower courts are “split on the issue” of

“whether, when common issues or questions fail to predominate over an entire claim or action, a court may properly ‘isolate the common issues under Rule 23(c)(4)[] and proceed with class treatment of these particular issues.’” *Jacob*, 2013 WL 4028147, at *8.

For example, the Fifth Circuit holds that Rule 23(c)(4) cannot be employed “to sever issues until the remaining common issue predominates over the remaining individual issues;” instead, “a cause of action, as a whole, must satisfy [Rule 23(b)(3)’s] predominance requirement” before Rule 23(c)(4) can be used as a “housekeeping rule” to “sever the common issues for a class trial.” *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996).

The Fifth Circuit’s interpretation of Rule 23 currently “commands a substantial following.” 1 Joseph M. McLaughlin, *MCLAUGHLIN ON CLASS ACTIONS* § 4:43 (9th ed. 2012). It also comports with the U.S. Supreme Court’s recent description of the prerequisites for class certification. As *Comcast* explains, “a party seeking to maintain a class action ‘must affirmatively demonstrate his compliance’ with Rule 23,” which means that the party “must not only” meet the requirements of Rule 23(a) but “must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b).” *Comcast Corp.*, 133 S. Ct. at 1432. Consequently, a “proposed class must satisfy at least one of the three requirements listed in Rule 23(b).” *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2548. Nothing in the plain text of Rule 23(c)(4) overrides this command. Thus, where a plaintiff attempts to make this showing based on Rule 23(b)(3), a court cannot sever “individual-specific issues” to “‘manufacture predominance through the nimble use of subdivision (c)(4).’” *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 422 (5th Cir. 1998).

To the extent the Fifth Circuit’s interpretation prevails, courts may lack the authority to certify common liability issues for a class trial under Rule 23(c)(4) where individualized damages issues predominate since plaintiffs cannot use this provision to “excise” from the class the same individualized damages issues that defeat Rule 23(b)(3)’s predominance requirement. *Corley v. Orangefield Indep. Sch. Dist.*, 152 F. App’x 350, 355-56 (5th Cir. 2005).

Calls for Supreme Court Intervention

The existing split of authority over *Comcast*’s impact, which continues to widen with each passing month, may require U.S. Supreme Court intervention to definitively resolve whether, and under what circumstances, individualized damages issues defeat class certification under Rule 23(b)(3).

Defendants have already begun to file petitions for writs of *certiorari* to challenge lower court decisions—including the Seventh Circuit’s decision in *Butler*—that attempt to read *Comcast* out of existence or to sidestep its holding. See, e.g., Petition for a Writ of Certiorari, *Sears, Roebuck and Co. v. Butler*, No. 13-430 (U.S. Oct. 7, 2013), 2013 WL 5519505; Petition for a Writ of Certiorari, *Whirlpool Corp. v. Glazer*, No. 13-431 (U.S. Oct. 7, 2013), 2013 WL 5532730. Time will tell whether the U.S. Supreme Court steps in to resolve the division among the lower courts over the meaning of *Comcast*.

Conclusion

The existing split over *Comcast*’s impact will likely continue to grow in the years ahead, given the deep divisions that have already emerged less than a year after it was decided. As these developments come to a head, uncertainty will remain as to whether *Comcast* precludes class certification under Rule 23(b)(3) where individualized damages issues predominate over common questions. As a practical matter, plaintiffs and defendants may need to raise their contradictory arguments on the issue in order to preserve their respective positions until the U.S. Supreme Court definitively resolves this issue.