

2nd Circ. Unlikely To Change Class Action Status Quo

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In *Roach v. T.L. Cannon Corp.*, Case No. 13-3070 (Feb. 10, 2015), the Second Circuit weighed in on the issue of whether class certification can be denied on the basis that individualized damages calculations defeat Rule 23(b)(3)'s predominance prerequisite. The Second Circuit held:

Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013), does not require that damages be measureable on a classwide basis for certification under Rule 23(b)(3).

In order to analyze class certification defenses and case management approaches that will remain important in light of the Second Circuit's decision (i.e., where are we going?), it is helpful to first review the past few years of class certification jurisprudence (i.e., how did we get here?).



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Two years after the U.S. Supreme Court's landmark ruling in *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the high court issued its decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). In *Comcast*, the Supreme Court addressed how damages-related issues should be considered in the context of a rigorous analysis of the class certification prerequisites.

Following *Comcast*, it is generally accepted that a rigorous analysis of the class certification prerequisites extends to the requirement that the damages methodology correspond to the particular wrongdoing being alleged. That is, class certification should be denied if the methodology measures "damages that are not the result of the wrong." Likewise, the question that the Supreme Court presumably was going to answer in *Comcast* — whether expert opinion testimony going to the ability to develop a classwide damages model must pass Daubert scrutiny at the class certification stage — is gaining general acceptance.

However, following the Supreme Court's ruling in *Comcast*, there emerged divisive precedent regarding the meaning of the statement that Rule 23(b)(3) requires that "damages are susceptible of measurement across the entire class." The proverbial fork in the road on this issue was foreshadowed by the dissent in *Comcast*, which observed that the majority's statement "breaks no new ground." According to the dissent, Rule 23 jurisprudence would continue to reflect the principle that "individual

damages calculations do not preclude class certification under Rule 23(b)(3).”

A number of district court decisions denying class certification have read Comcast to now require the plaintiff to establish an aggregate total of class action damages, in effect holding that class certification requires a sum-certain model or push-button spreadsheet. For these courts, different amounts or inputs into a classwide damages formula is enough to defeat class certification, reasoning that Comcast requires a damages model that does not involve individualized facts. Along these lines, the district court in *Roach*, in a decision that was vacated by the Second Circuit, reasoned that class certification must be denied because the plaintiff did not offer a model of damages susceptible of measurement across the class. Other courts have read Comcast more narrowly, holding that individualized issues of damages cannot, standing alone, defeat class certification. Still other courts have bifurcated damages issues from classwide issues of liability.

The Second Circuit’s decision in *Roach* directly confronts the post-Comcast issue of whether class certification should be denied where — and solely on the basis that — there is no classwide damages model or calculation, holding that “Comcast Corp. [...] does not require that damages be measurable on a classwide basis for certification under Rule 23(b)(3).” The Second Circuit’s ruling means, at a minimum, that class certification cannot be denied on the basis that a damages calculation would be based on different numbers or amounts entered into a common, classwide methodology or formula. For example, *Roach* teaches that class certification cannot be denied simply because class members purchased different numbers of defective widgets or paid different prices for those widgets. Similarly, in a Fair Labor Standards Act overtime case, class certification cannot be denied because one employee would be entitled to a larger recovery than another employee based on differences in the number of hours worked.

So where do we go from here? Based on the jurisprudence under Rule 23, it seems that courts will continue to deny class certification on damages-related considerations in at least four instances.

First, courts are likely to deny class certification where the question of whether (or if) a particular member of the class suffered or incurred any damage depends on individualized evidence and factual determinations. This is the distinction between fact of damage and amount of damage, such as where there is no common and classwide injury. While the causation-driven question of injury or harm to putative class members is sometimes considered as presenting individualized issues of fact under Rule 23(b)(3), the same issue can also be raised on grounds of class ascertainability or of an overbroad class definition.

Second, courts will readily deny class certification where the calculation of individual damages would depend on different theories or methodologies, especially where the applicability of a given theory or methodology depends on individual facts or circumstances.

Third, as set out in Comcast, courts will deny class certification where the damages calculation methodology does not correspond to the theory of wrongdoing.

Fourth, it appears that courts will continue to deny class certification where the calculation of individual damages would not be based on any classwide methodology or objectively ascertainable data entered into a common formula, but instead would depend on a series of individualized determinations. For example, damages for pain and suffering or other emotional distress are inherently individualized (and may not arise on a classwide basis), as are consequential damages for lost profits. In these instances, the presence of individualized defenses (e.g., mitigation) also could factor into the Rule 23 analysis.

Additionally, if Roach means that class certification cannot be denied solely on the basis of individualized damages computations (such as individual inputs into a common and classwide formula), then what case management approaches or procedures are available to courts to bring a class action case to conclusion?

The case management alternatives could include one or more of the following: (1) bifurcation of cases between liability and damages phases; (2) use of “opt-in” or “claims made” classes; (3) use or authorization of “average” recoveries or distributions, use of a disgorgement theory or calculation, or reliance on a “price premium” damages theory rather than an out-of-pocket loss theory; (4) use or authorization of econometric or statistical modeling; (5) shifting the burden to the defendant to ascertain or calculate class members’ damages; and (6) use of special masters in post-liability claim processing proceedings. In contested class actions, defendants will raise due process and other objections to these and other case management techniques, which can have the effect of reducing or minimizing the plaintiff’s burden of proof or impairing a defendant’s right to defend against damages claims.

In the final analysis, it does not appear that the Second Circuit’s decision in Roach will usher in a new era of class action certifications. Rather, it seems that the Second Circuit is reading the majority Comcast opinion like the dissent: that the majority opinion did not significantly alter the Rule 23 landscape. If Roach calls into further doubt the viability of a new theory to defeat class certification under Rule 23(b)(3), there are still arguments and theories on both sides of the case. It’s back to business as usual.

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