

Reproduced with permission from Class Action Litigation Report, 15 CLASS 332, 03/28/2014. Copyright © 2014 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

### CERTIFICATION

#### DAMAGES

## The New Normal: The Need for Damages Proof To Certify Consumer Classes Post-Comcast



BY SASCHA HENRY AND JOHN M. LANDRY

In consumer class actions, the damages measure tends to remain undisclosed or ill-defined when plaintiffs move for class certification. Revealing as little as possible about damages allows plaintiffs to more flexibly adapt to changes in theory or proof as the action unfolds. It also deprives defendants of an early opportunity to challenge any particular damages measure. By focusing on liability issues over damages issues when assessing Federal Rule of Civil Procedure

*Sascha Henry, a partner in Sheppard Mullin's Business Trial practice group in Los Angeles and co-chair of the firm's consumer class action defense team, specializes in defending clients in complex business litigation and consumer class actions. She is available at [shenry@sheppardmullin.com](mailto:shenry@sheppardmullin.com).*

*John M. Landry, a special counsel in Sheppard Mullin's Antitrust practice group in Los Angeles, practices in a broad spectrum of subject areas and has substantial expertise in the defense of complex class actions. He can be reached at [jlandry@sheppardmullin.com](mailto:jlandry@sheppardmullin.com).*

23(b)(3)'s predominance requirement, federal courts have acquiesced in—if not encouraged—this hide-the-damages-ball strategy.

Lower-court reaction to last year's U.S. Supreme Court opinion in *Comcast Corp. v. Behrend*<sup>1</sup> is increasingly rendering this strategy untenable. Although an antitrust case, *Comcast* offers a fundamental Rule 23(b)(3) insight: Individual damages can overwhelm common issues, defeating predominance. As a result, a district court's rigorous analysis must invariably assess if individual damages issues predominate, or not. Citing *Comcast*, district courts now require consumer plaintiffs on Rule 23(b)(3) motions to show precisely how they will measure and prove classwide damages at trial. Unsound methods do not carry this burden. Indeed, *Comcast* suggests consumer plaintiffs must show that the proposed measure squarely rests on proof of consumer harm. Damages issues in consumer class actions will continue to garner Rule 23(b)(3) attention as lower courts grapple with *Comcast*'s full implications.

### Individual Damages and Rule 23(b)(3)

Plaintiffs purporting to assert monetary claims on behalf of consumer classes in federal court must proceed via Rule 23(b)(3).<sup>2</sup> This rule requires, among other things, that “questions of law or fact common to the class predominate over any questions affecting only individual members.”<sup>3</sup> Awarding damages to class members inherently requires some degree of individualized proof. For some courts, non-formulaic or “labyrinthine” calculations defeat predominance unless a proposed

<sup>1</sup> 133 S. Ct. 1426 (2013).

<sup>2</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011) (stating “individualized monetary claims belong in Rule 23(b)(3)”).

<sup>3</sup> Fed. R. Civ. P. 23(b)(3).

classwide method—serving as an intermediate step—can overcome the complexity and render the “the process of computing individual damages . . . a virtually mechanical task.”<sup>4</sup> But many courts, pre-*Comcast*, avoided damages inquiries altogether by testing only whether common liability issues predominated over individual liability issues, rather than over all issues.<sup>5</sup> These courts also relied on the availability of later procedures to manage individual damages issues.<sup>6</sup> As the First Circuit has stated, the “individuation of damages in consumer class actions is rarely determinative under Rule 23(b)(3). Where, as here, common questions predominate regarding liability, the courts generally find the predominance requirement to be satisfied even if individual damages remain.”<sup>7</sup>

### **Comcast v. Behrend**

Comcast allegedly acquired a monopoly subscriber share in a 16-county geographic market, and raised its cable rates above competitive levels. Comcast subscribers brought antitrust claims against Comcast in federal district court. They advanced four competition-injury theories and a classwide damages model to measure their aggregate effects. On the plaintiffs’ motion for class certification, however, the district court found only one of the four theories susceptible to class treatment. Although the damages model did not isolate this theory’s effects from the other three, the court concluded common issues predominated over any individual damages issues, and certified the alleged class.

A Third Circuit panel affirmed. It viewed the model’s failure to measure only those damages arising from the one accepted theory as a merits-based consideration outside the bounds of Rule 23. To establish predominance, it held a plaintiff need only “assure” the district court that “damages are capable of measurement and will not require labyrinthine individual calculations.”<sup>8</sup> It found that the plaintiffs’ model accomplished this by “provid[ing] a method to measure and quantify damages on a classwide basis.”<sup>9</sup> It found no need to decide “whether the methodology [was] a just and reasonable inference or speculative.”<sup>10</sup>

A divided Supreme Court reversed “on the straightforward application of class-certification principles.”<sup>11</sup> It found that the plaintiffs’ damages model “bore on the propriety of class certification” and, therefore, deserved full Rule 23(b)(3) scrutiny. Without discussion, the Court accepted the Third Circuit’s basic premise that labyrinthine calculations can predominate, requiring a classwide damages method. But it disagreed that “any method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the mea-

surements may be.”<sup>12</sup> In the Court’s view, the model’s failure to align with the only accepted liability theory rendered it “unsound,” and thus incapable of measuring the damages in the case.<sup>13</sup> Because plaintiffs conceded the need for a classwide damages method, and had proposed no alternative model, they failed to show Rule 23(b)(3) predominance.<sup>14</sup>

The dissent focused on the “oddy” of the plaintiffs’ concession on the need to prove damages on a classwide basis. It took pains to cabin the majority’s opinion to the particular facts, stating “[t]he Court’s ruling is good for this day and case only.”<sup>15</sup> It further cautioned that “the [majority’s] decision should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable ‘on a classwide basis.’”<sup>16</sup>

### **Comcast and Putative Consumer Class Actions**

At its core, *Comcast* rests on the notion that individual damages issues can overwhelm common issues, including common liability issues, and defeat predominance. Rulings in putative consumer class actions since *Comcast* permit several observations. Plaintiffs seeking class action recoveries must now generally present a classwide method for measuring damages. The proposed method must be “sound” and suited for the task at hand. The method must also tie tightly into the plaintiff’s theory of consumer harm by yielding an actual damages number.

### **Consumer Plaintiffs Must Demonstrate Method to Prove Classwide Damages**

Damages calculations in consumer class actions are not naturally formulaic.<sup>17</sup> Along with a proposed damages measure, expert evaluation or other assessment is often needed to show the fact and extent of consumer injury. Under *Comcast*, a failure to disclose an adequate method leaves the predominance question (on which plaintiff bears the burden of proof) fatally unresolved.<sup>18</sup> Accordingly, as a practical matter, consumer plaintiffs cannot risk remaining silent on damages. Moreover, district courts read *Comcast* as affirmatively requiring plaintiffs to proffer a classwide method for measuring consumer harm.

*Bright v. Asset Acceptance, LLC*<sup>19</sup> is an example. There, the defendant debt collection agency allegedly violated federal law when it called consumers using a telephone number disguising the agency’s true name on

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 1434.

<sup>14</sup> In an aside, the Court agreed with this concession, noting that even if plaintiffs’ model had aligned with the liability theory, the model still would not have established the requisite “commonality of damages” unless it showed uniform price effects across all 16 counties. *See id.* at 1435 n.6.

<sup>15</sup> *Id.* at 1437 (Ginsburg & Breyer, JJ., dissenting).

<sup>16</sup> *Id.* at 1436.

<sup>17</sup> Some non-consumer contexts may allow formulaic calculations. *See, e.g., Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (finding defendant’s payroll database enabled formulaic calculations in alleged wage and hour class action).

<sup>18</sup> Plaintiffs in *Comcast*, in fact, conceded the lack of predominance absent a valid classwide damages model.

<sup>19</sup> 292 F.R.D. 190 (D. N.J. 2013).

<sup>4</sup> *See, e.g., Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975); *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294, 304 (5th Cir. 2003).

<sup>5</sup> *See, e.g., Tardoff v. Knox County*, 365 F.3d 1, 6 (1st Cir. 2004).

<sup>6</sup> *See, e.g., In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 141 (2d Cir. 2001).

<sup>7</sup> *Smilow v. Sw. Bell Mobile Sys. Inc.*, 323 F.3d 32, 40 (1st Cir. 2003).

<sup>8</sup> *Behrend v. Comcast Corp.*, 655 F.3d 182, 206 (3d Cir. 2011).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Comcast*, 133 S. Ct. at 1433.

consumer's caller I.D. devices. Although the plaintiff asserted damages claims, and moved to certify a consumer class, he never explained how he planned to prove damages. He argued that any individual damages issues would not predominate over the main, common liability questions. The district court denied the motion, stating "[t]he Supreme Court's recent opinion in [*Comcast*] is clear that a plaintiff seeking class certification must present evidence of a reliable methodology for calculating damages on a class-wide basis."<sup>20</sup>

*Bright* is consistent with other decisions interpreting *Comcast* as not permitting Rule 23(b)(3) certifications when individual damages calculations overwhelm common questions.<sup>21</sup> These decisions read *Comcast* as categorically requiring a method capable of measuring damages for each class member. Notably, two federal courts of appeals view any such mandate as having "limited application" when consumer plaintiffs seek to certify classes for purposes of only determining liability using Rule 23(c)(4) (authorizing "issues" classes), leaving damages determinations for separate non-class proceedings.<sup>22</sup> But using Rule 23(c)(4) to create the common-issue predominance that otherwise would not exist is controversial.<sup>23</sup> A consumer plaintiff must also separately justify the invocation of Rule 23(c)(4) as "materially advanc[ing] the disposition of the litigation as a whole."<sup>24</sup> Yet, when no available classwide method can overcome non-formulaic individual damages calculations, expect consumer plaintiffs to invoke Rule 23(c)(4).

### Classwide Method Must Be Valid and Plausible

*Comcast* also requires that district courts apply a rigorous analysis to proposed classwide damages methods. This is a significant shift in the scrutiny formerly afforded proposed damages models at the class certification stage. At least one district court has analogized this aspect of *Comcast* to the more demanding pleading scrutiny the Court introduced in *Bell Atlantic Corp. v. Twombly*.<sup>25</sup> In *Comcast*, the damages model failed to survive rigorous analysis because its scope did not align with the only liability theory in the case. *Comcast* squarely applies to any proposed method in a consumer class action that exhibits this same flaw.

That was the case in *Martin v. Ford Motor Company*.<sup>26</sup> Alleging a design defect leading to a cracked rear axle, the plaintiff sued Ford under various theories, including violation of state consumer protection laws.

<sup>20</sup> *Id.* at 203.

<sup>21</sup> See *Cabbat v. Philip Morris USA, Inc.*, 2014 BL 1807, at \*12 (D. Haw. Jan. 6, 2014); *Wheeler v. United Servs. Auto. Ass'n*, 2013 BL 228368, at \*4-5 (D. Alaska Aug. 27, 2013); *Cowden v. Parker & Assocs., Inc.*, 2013 BL 134148, at \*6-7 (E.D. Ky. May 22, 2013); *Roach v. T.L. Cannon Corp.*, 2013 BL 83767, at \*3-4 (N.D.N.Y. Mar. 29, 2013).

<sup>22</sup> *In re Whirlpool Corp. Frontloading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860 (6th Cir. 2013); *Butler v. Sears, Roebuck and Co.*, 727 F.3d 796, 800 (7th Cir. 2013); see also *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014).

<sup>23</sup> *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996).

<sup>24</sup> Manual for Complex Litigation (Fourth) § 21.24 (2004).

<sup>25</sup> *In re BP P.L.C.*, 2013 BL 336825, at \*18 (S.D. Tex. Dec. 6, 2013).

<sup>26</sup> 292 F.R.D. 252 (E.D. Pa. 2013).

On the plaintiff's motion for class certification, the district court cited *Comcast* for the proposition that a plaintiff's damages model must measure only those damages attributable to the liability theory.<sup>27</sup> The facts showed Ford had implemented a safety recall in connection with rear axle complaints, with the recall data revealing no cracks in 83.2 percent of rear axles. For these owners, plaintiff's expert proposed measuring damages based on decreases in resale prices for Windstars after the market learned of the safety recall. Although the expert opined that resale prices would reflect the recall's impact, his report failed to offer a method to isolate that impact from other factors bearing on resale prices.<sup>28</sup> Thus, *Comcast* required the district court to reject plaintiff's resale-price based model.

Though the model in *Martin* failed for the same reason as the model in *Comcast*, any flaw undermining the soundness of a proposed damages method leaves the predominance question unanswered, and defeats class certification. In *Gooden v. Suntrust Mortgage, Inc.*,<sup>29</sup> the plaintiff's mortgage agreement with defendant required her to purchase hazard and flood insurance coverage in an amount at least equal to the replacement value of her home. Claiming her existing coverage was inadequate, defendant "forced placed" additional insurance on the property at her expense. Plaintiff sued defendant for damages on behalf of herself and an alleged class. To overcome the court's need to determine the replacement value of each class members' home for purposes of liability and damages, she proposed using the values the bank itself estimated at the time it forced placed the coverage. The bank argued, however, that its estimates were only "shorthand calculations" and not actual replacement values. Citing *Comcast*, the district court stated: "Simply because defendant uses these proxies to determine the amount of insurance it will require of its borrowers as part of its own business model does not change the fact that these proxies are essentially estimates that do not take into consideration the many individual factors that might affect a particular home's replacement value."<sup>30</sup>

In post-*Comcast* consumer class actions, when proposed damages methods are invalid, fail to rest on reasonable inferences, or otherwise cannot perform the intended task, they provide no basis for a district court to conclude that individual damages calculations do not predominate, and so defeat class certification.

### Proposed Damages Method Must Also Yield Actual Damages Number

As *Comcast* instructs, "plaintiff's damages case must be consistent with its liability case."<sup>31</sup> This arguably requires more than merely showing that the "model . . . measures only those damages attributable to the [liability] theory." That is, even when the scope of alleged damages aligns with liability, *Comcast* suggests the need for plaintiffs to establish a more fundamental connection by showing the proposed method actually produces a positive damages number. This is precisely

<sup>27</sup> *Id.* at 274.

<sup>28</sup> *Id.* at 275-76, 279.

<sup>29</sup> 2013 BL 342689 (E.D. Cal. Dec. 11, 2013).

<sup>30</sup> *Id.* at \*6-7.

<sup>31</sup> *Comcast*, 133 S. Ct. at 1433.

how two district courts have applied *Comcast's* consistent-with-liability language.

In *Guido v. L'Oreal, USA, Inc.*,<sup>32</sup> the plaintiff alleged L'Oreal failed to label its "anti-frizz" hair products as flammable. In support of class certification, she stated that expert proof at trial would value the properly-labeled product at \$0 or substantially less than its actual retail price. She proposed to calculate damages based on the difference between the historical prices paid and the product's true market value. The district court deemed this measure valid under the consumer protection statutes at issue. The court, however, citing *Comcast* as requiring "evidence demonstrating the existence of a class-wide method of awarding relief that is consistent with plaintiff's theory of liability," demanded that the plaintiff submit expert proof showing that the product's historical market prices in fact exceeded the true market value.<sup>33</sup> In other words, only by showing that L'Oreal's alleged omissions measurably impacted market prices could plaintiff establish the requisite consistency between liability and damages. The district court denied class certification without prejudice to allow the opportunity to submit any such proof.<sup>34</sup>

A similar result occurred in *Stoneback v. Artsquest*.<sup>35</sup> There, the purchaser of collectible beer steins and mugs brought a putative class action against the seller for falsely advertising the items as made in Germany, when they were really made in China. She claimed that she and an alleged consumer class paid inflated prices as a result. Evidence in support of class certification showed the defendant paid its importer less for steins and mugs originating from China than from Germany. The district

court found this failed to comply with *Comcast's* command "that damages [be] susceptible of measurement across the entire class." It criticized the plaintiff for failing to produce "any evidence comparing the actual value of steins and mugs manufactured in Germany with the actual value of steins and mugs manufactured in China."<sup>36</sup> Without this evidence, nothing suggested the alleged false advertising caused any injury, particularly since defendant, when it later corrected its labeling, did not lower its prices.

As in the above cases, consumer class actions often require inquiry into the "true" value of an allegedly falsely advertised product to show the fact and extent of injury. *Guido* and *Stoneback* illustrate the use of *Comcast* to require plaintiffs to show, at the Rule 23 stage, an actual excess in the amount paid over the value received. In other words, only when the plaintiff can show the proposed damages measure in fact yields a damages number has plaintiff shown the requisite "consisten[cy] with its liability case." Merely pointing to a valid damages measure and the availability of sales and price data fails to forge the deeper link *Comcast* requires.<sup>37</sup>

## Conclusion

Consumer class action plaintiffs can no longer remain silent on damages at the Rule 23 stage. Because individual damages issues can predominate, plaintiffs must reveal how they intend to measure damages across the entire class. The proposed classwide damages method must be valid, sound and closely bound to plaintiff's liability theory. Significantly, district courts must entertain defendants' challenges to this proof.

<sup>32</sup> Case No. 2:11-cv-01067 (C.D. Cal. July 1, 2013).

<sup>33</sup> *Id.* at 23-24.

<sup>34</sup> The plaintiff subsequently renewed her motion. The pending motion proffers expert testimony claiming that scientific methods ("Random Coefficients Demand Estimation" and "Conjoint Analysis") can prove the product's true market value (absent the warning label) and the additional units L'Oreal sold as a result of its alleged failure-to-label conduct. Her expert also offers a preliminary observation that the product's average effective price increased after L'Oreal removed the warning label, stating that this suggests consumers valued the product more without the label. This submission may not satisfy the court's *Comcast* demand. It also opens the door to possible *Daubert* challenges.

<sup>35</sup> 2013 BL 164516 (E.D. Pa. June 20, 2013).

<sup>36</sup> *Id.* at \*16.

<sup>37</sup> See *Cabbat*, 2014 BL 1807, at \*12 (finding plaintiffs' "bare representations" that proposed "damages methodology is point-of-purchase and benefit of the bargain" did not show it "measure[d] the economic impact of [defendant]'s alleged conduct"). At least one district court, however, found the requisite "consistency" where plaintiffs alleged point-of-sale injury, sought return of some or all of the purchase price, and "represent[ed]" they could calculate damages based on defendant's sales records. See *Astiana v. Kashi Co.*, 291 F.R.D. 493, 506 (S.D. Cal. 2013). The court in *Astiana*, however, arguably did not require a proposed method of proof, only the assurance of one, in direct contravention of *Comcast*.