

Second Circuit: Class Certification is Alive and Well in Employment Cases Involving Individualized Damages

On February 10, 2015, the United States Court of Appeals for the Second Circuit decided *Roach v. T.L. Cannon Corporation*,¹ resolving the question of how the Supreme Court's *Comcast Corp. v. Behrend* decision should be interpreted in the Circuit. *Comcast* concerned the certification standard for damages class actions pursuant to Federal Rule of Civil Procedure 23(b)(3).² In *Comcast*, the Supreme Court held that it was improper to certify a class where questions of individual damage calculations would "overwhelm" questions that were common to the class.³ The *Roach* opinion makes clear that in the Second Circuit, *Comcast* does not overrule a "well-established" line of cases holding that individualized damages will not necessarily defeat a Rule 23(b)(3) certification.⁴ As a result, the mere fact that damages must be calculated individually is insufficient by itself to defeat class certification in employment cases.

As we discussed in a recent [article](#), courts within the Second Circuit had split on whether *Comcast* should be read broadly, to prohibit class certification whenever damages were not amenable to class-wide proof, or narrowly, to require only that a plaintiff's damages model actually measure the damages that result from a specific theory of injury. A broad reading would have made it very difficult to certify wage and hour class actions requiring plaintiff-by-plaintiff damages calculations. The Second Circuit sought to resolve this split in the *Roach* opinion.

In *Roach*, a group of plaintiffs alleged that an Applebee's franchisor failed to make "spread of hours" payments then required under New York law, in violation of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (FLSA) and the New York Labor Law §§ 650 et seq. (NYLL). Based on its broad reading of *Comcast*, the district court held that certification under Rule 23(b)(3) was not appropriate because the proposed class's damages were not measurable on a class-wide basis.⁵ Since determining damages would require individual inquiries into the hours worked by each proposed class member, the district court held that Rule 23(b)(3)'s predominance criterion was not met and that certification must be denied.

In its opinion, the Second Circuit reversed, holding that it was improper to deny certification simply because damages were individualized. Instead, it held that the existence of individualized damages calculations is just one factor that courts must consider when deciding whether to certify a class under Rule 23(b)(3). Because the record in *Roach* was devoid of any indication that the court assessed whether common issues susceptible to generalized proof outweighed the complications associated with individual damages calculations, an analysis it found that Rule 23(b)(3) requires, the Second Circuit remanded the case to the district court to conduct this analysis.⁶

In a related Summary Order issued the same day, the Second Circuit upheld a district court's decision to certify a liability-only class pursuant to Rule 23(c)(4). In *Jacob v. Duane Reade*,⁷ plaintiffs alleged that Duane Reade had misclassified its pharmacy assistant store managers as exempt from FLSA overtime requirements.⁸ The district court concluded that individualized proof of damages would overwhelm any questions common to the class.

1 *Roach v. T.L. Cannon Corp.*, No. 13-3070-cv (2d Cir. Feb. 10, 2015).

2 *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

3 *Id.* at 1432-33.

4 *Roach*, slip op. at 23.

5 *Id.* at 8-9.

6 *Id.* at 24-26.

7 *Jacob v. Duane Reade, Inc.*, 13-3873-cv (2d Cir. Feb. 10, 2015)(SO).

8 *Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578 (S.D.N.Y. 2013).

However, rather than deny class certification entirely, the district court certified a liability-only class pursuant to Rule 23(c)(4)⁹ and left the damages determinations for individual hearings. In its Summary Order, the Second Circuit held that splitting liability and damages in this way was not an abuse of the court's discretion.¹⁰

Read together, *Roach* and *Duane Reade* suggest that defendant employers will have a hard time defeating class certification even when individual employee damages are highly individualized. Plaintiffs are likely to argue that damages are irrelevant to class certification because, even if they overwhelm common questions, the problem can be solved by certifying a liability-only class pursuant to Rule 23(c)(4). But because *Duane Reade* is a Summary Order and binds only the parties to the case, the scope of Rule 23(c)(4) and its relationship to the *Comcast* decision is likely to be re-visited.

9 Fed. R. Civ. P. 23(c)(4) (this rule gives litigants the option, "when appropriate," to bring or maintain a class action only with respect to particular issues).

10 *Jacob*, slip op. at 5-6.

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