

# Unpacking the Employment Implications of *Comcast Corp. v. Behrend*: The Second Circuit Prepares to Dive In

By Lisa E. Cleary, Helen O'Reilly and Adam Pinto

Class actions (and even the threat thereof) are one of the most powerful tools wielded by plaintiffs in employment matters. Much to the dismay of many plaintiff-side attorneys, recent Supreme Court decisions have made it significantly harder for plaintiffs to certify classes. The Court's watershed 2011 opinion in *Wal-Mart Stores, Inc. v. Dukes* heightened the threshold for certification generally and specifically under Fed. R. Civ. P. 23(b)(2).<sup>1</sup> And, describing class actions as "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," *Wal-Mart* appeared to signal that the Supreme Court would be taking a more rigorous approach to class certification generally.<sup>2</sup> This was confirmed last year in *Comcast Corp. v. Behrend*, a case in which the Supreme Court held that the predominance requirement of Fed. R. Civ. P. 23(b)(3) had not been met and vacated the lower court decisions certifying the class.<sup>3</sup>

Justice Scalia's majority opinion in *Comcast* emphasized that the predominance requirement cannot be satisfied where "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class."<sup>4</sup> That statement left lower courts to determine when and in what circumstances questions of individual damage calculations are so "overwhelming" that they defeat common questions of law or fact. Seizing on the Supreme Court's repeated emphasis on classwide adjudication as a limited, procedural exception to individualized determinations, some have argued that *Comcast* severely limits instances in which class certification is appropriate, particularly in cases where damages awards will vary widely based on the individual circumstances of different plaintiffs. But others caution that an overly broad interpretation of *Comcast's* admonition would effectively eliminate classwide relief—even when the questions of liability are overwhelmingly common.

This battle of interpretation is currently being played out in the lower courts. In a pair of wage-and-hour cases, two New York district courts in the Second Circuit recently relied on *Comcast* to reach different conclusions on similar sets of facts. In *Roach v. T.R. Cannon Corp.*, plaintiffs alleged that an Applebee's franchisor violated the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (FLSA), and the New York Labor Law §§ 650 *et seq.* (NYLL) by (among other things) failing to make "spread of hours" payments.<sup>5</sup> Relying on *Comcast*, the Northern District declined to certify the class in light of the highly individualized damages for each plaintiff. In *Jacob v. Duane Reade*, the Southern District reached a different conclusion when faced with similar facts.<sup>6</sup> There, the plaintiffs also alleged

FLSA and NYLL violations. Though the court concluded that damages could not be assessed on a classwide basis, it permitted the class action to proceed on liability rather than deny certification outright. In both *Roach* and *Jacob*, the losing parties appealed the decision to the Second Circuit.

In October 2013, the Second Circuit agreed to hear the two cases in tandem, indicating that it intends to shed light on the proper interpretation of *Comcast* in wage-and-hour class actions in its Circuit.<sup>7</sup>

## I. Did Comcast Add a Damages Model Requirement to Rule 23(b)(3)?

Class certification is governed by Federal Rule of Civil Procedure 23. A party seeking class certification has the burden to prove that the four prerequisites of Rule 23(a) are satisfied: numerosity, commonality, typicality, and adequacy of representation.<sup>8</sup> It then must prove that the proposed class falls within one of the three categories of Rule 23(b).<sup>9</sup> If none of the elements of Rule 23(b) have been satisfied, certification must be denied.<sup>10</sup> To certify a damages class under the third category, Rule 23(b)(3), a plaintiff must prove that common issues predominate and that the proposed class action is superior to other available methods for adjudicating the controversy. To satisfy the predominance requirement, "questions of law or fact common to class members [must] predominate over any questions affecting only individual members."<sup>11</sup>

In *Comcast*, plaintiff consumers brought an antitrust class action against a cable provider under Rule 23(b)(3). Plaintiffs alleged that Comcast obtained (or attempted to obtain) a monopoly in sixteen counties across Pennsylvania, New Jersey, and Delaware in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. § 1 *et seq.* The district court stated (and it was uncontested throughout the litigation) that plaintiffs had to show that "the damages resulting from that [antitrust] injury were measurable 'on a class-wide basis' through use of a 'common methodology.'"<sup>12</sup> At the district court level, plaintiffs proposed four theories of antitrust impact, and plaintiffs' expert designed a regression model that calculated damages based on all four theories. But the district court only accepted one such theory—the "overbuilder" theory. Critically, plaintiffs' expert acknowledged that the model did not isolate damages resulting only from this theory. Despite this acknowledged limitation, the district court certified plaintiffs' class under Rule 23(b)(3), rejecting defendants' argument that the model's shortcomings were fatal to

class certification.<sup>13</sup> A divided Third Circuit panel affirmed, concluding that Comcast's "attack[] on the merits of [plaintiffs'] methodology [had] no place in the class certification inquiry."<sup>14</sup>

The Supreme Court granted certiorari. In its 5-4 decision, Justice Scalia's majority opinion reiterated the Court's admonition from *Wal-Mart Stores* that "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only'.... To come within the exception, a party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with Rule 23."<sup>15</sup> To determine whether this requirement is met, the Court instructed lower courts to engage in "a rigorous analysis" of the plaintiff's evidence; it added that "[i]f anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)."<sup>16</sup>

Applying this standard to the facts at issue, the Court held that the class was improperly certified. The majority opinion concluded that plaintiffs' damages model fell "far short of establishing that damages [were] capable of measurement on a classwide basis."<sup>17</sup> Since the regression model did "not even attempt" to measure damages resulting from the "overbuilder" antitrust injury, accepting such a model would mean that "at the class-certification stage any method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be."<sup>18</sup> Allowing this would, according to the Court, reduce Rule 23(b)(3)'s predominance requirement to "a nullity."<sup>19</sup>

The Court's opinion provoked a strong dissent, jointly authored by Justices Ginsburg and Breyer and joined by Justices Kagan and Sotomayor. The dissenting justices tried to minimize the reach of the majority's holding, arguing that the majority's opinion "breaks no new ground on the standard for certifying a class action under [Rule] 23(b)(3)."<sup>20</sup> And anticipating the potentially broad implications of the majority's holding, the dissent underscored that "the [majority] 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>21</sup>

## II. A Split Within the Second Circuit

Federal courts construing *Comcast* have offered inconsistent views as to whether, and under what circumstances, individualized damages issues preclude class certification. The class-certification decisions applying *Comcast* can be broken down into three groups: (1) those distinguishing *Comcast* and finding a common damages formula that satisfies the predominance requirement, see, e.g., *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 511 (9th Cir. 2013); (2) those applying *Comcast* and rejecting class certification because no common damages formula exists, see, e.g., *Roach v. T.L. Cannon Corp.*, No. 3:10 Civ. 0591

(TJM) (N.D.N.Y. Mar. 29, 2013); and (3) those that maintain class certification as to liability only, leaving damages for a separate, individualized determination; see, e.g., *Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578 (S.D.N.Y. 2013). The *Roach* and *Jacob* cases, both of which are fully briefed on appeal at the Second Circuit and which that court will decide in tandem, highlight the divergent interpretations *Comcast* has spawned.

### A. *Roach v. T.L. Cannon Corp.*

In *Roach v. T.L. Cannon Corp.*, current and former employees of Applebee's alleged a series of violations of the FLSA and NYLL. Most relevant to *Comcast* was plaintiffs' "spread of hours" claim under the NYLL. Plaintiffs asserted that they did not receive an additional hour of pay at the minimum wage on any day in which their work extended over a period of 10 hours, something required by the NYLL until January 1, 2011. Though the magistrate judge recommended certifying the "spread of hours" class, Judge McAvoy held that the class could not be certified in the wake of *Comcast*. Finding that individualized questions predominated regarding which employees were owed spread of hours payments and on which occasions they earned those payments, the court held that class certification was improper because individual damages calculations would overwhelm any common questions.

In their appellate briefing to the Second Circuit, plaintiffs emphasize that *Comcast* was an antitrust matter, not an employment matter, in which plaintiffs conceded that class certification depended on a classwide damages model—something unique to that case and not a new prerequisite for Rule 23(b)(3) certification.<sup>22</sup> To hold that such a model was required for 23(b)(3) certification in all contexts, as the district court did, would alter a "basic tenet of class-action jurisprudence."<sup>23</sup> And because plaintiffs' damages theory (that they were owed spread-of-hours wages) was tied directly to their theory of liability (that those wages were unlawfully denied), they argue that *Comcast* poses no impediment to class certification.<sup>24</sup>

The National Employment Lawyers Association (NELA) filed an *amicus* brief in support of plaintiffs' appeal. NELA states that the interpretation of *Comcast* adopted by the *Roach* court would be the "stake in the heart" for class actions generally, and for wage-and-hour class actions in particular.<sup>25</sup> Further, because individualized inquiries like those in *Roach* are often required when employers fail to maintain time records, affirming the case would provide incentives to keep inaccurate records.<sup>26</sup>

### B. *Jacob v. Duane Reade, Inc.*

The Southern District of New York reached a different conclusion after considering a similar set of facts. Prior to the Supreme Court's decision in *Comcast*, the Southern District had granted Rule 23 class certification to plaintiffs

claiming that Duane Reade had misclassified pharmacy assistant store managers as exempt from FLSA overtime requirements.<sup>27</sup> On a motion for reconsideration, the court partially decertified the class, finding that the Supreme Court's opinion in *Comcast* meant that the class must be decertified for damages purposes, although it could remain certified as to liability.<sup>28</sup> The court concluded that it had the authority to bifurcate adjudication of liability and damages by limiting its class certification order to a liability-only class under Rule 23(c)(4).<sup>29</sup> It stated that doing so was appropriate in cases in which individualized proof of damages could overwhelm common questions to defeat predominance under Rule 23(b)(3).<sup>30</sup> Although Judge Oetken recognized a disagreement among the circuits as to the use of this approach,<sup>31</sup> he noted that *Comcast* does not foreclose the possibility of certifying a liability-only class under Rule 23(c)(4) and that damages questions would prevent classwide treatment of the vast majority of employment class actions. The court further explained:

Rule 23(c)(4) cannot cure every ill that troubles a putative class. It can, however, serve as a useful and fair case management tool where (1) damages track liability in the manner contemplated by *Comcast*; (2) Rule 23(a) and (b) are satisfied as to common issues; and (3) individualized issues of proof predominate over a discrete, uncommon issue, such as damages, and due process impels that a defendant have the opportunity to respond to such individual positions.<sup>32</sup>

On appeal, appellants take issue with this approach. Although acknowledging that the Second Circuit has in the past looked favorably on the use of (c)(4) classes<sup>33</sup> appellants and their amicus argue that this approach is impermissible in the wake of *Comcast* and *Wal-Mart Stores*. According to appellants, once the District Court determined that Named Plaintiffs' claims as a whole did not satisfy Rule 23(b)(3)'s predominance requirement and thus that "certification of [the] class for all purposes would be inappropriate," the District Court had no choice but to deny class certification in light of the Supreme Court's holding in *Comcast*.<sup>34</sup>

### III. What Will the Second Circuit Do?

While it is impossible to predict how the Second Circuit will interpret *Comcast* when it decides *Roach* and *Jacob* in the coming months, the views of the case detailed above offer a look at some possible approaches. If the Second Circuit reads *Comcast* broadly and states that these cases present facts under which individualized damages issues overwhelm any common questions, it may limit the availability of wage-and-hour class actions or force an increasing reliance on bifurcation of these class actions into liability and damages phases. A

more narrow reading of *Comcast*, however, as a case that simply requires that some classwide damages model exist—not that the model be deployable in the same manner for every plaintiff—may also suffice. In a simple unpaid wages case, for example, a sufficient "model" could be: (unpaid hours worked by each employee) X (rate of pay for each employee) = damages. Though the model will provide different results for each individual employee, it would operate in the same way for each class member, and calculating individual damages would be a ministerial task. Requiring a model of this sort would not doom wage-and-hour class actions, though it could make things more challenging for plaintiffs attempting to certify more complex class actions involving discrimination or other fact-intensive claims. Finally, the Second Circuit could apply a very narrow reading of *Comcast* and simply require that plaintiffs' damages theory be tied to their liability theory, something that would pose little obstacle for employment class actions.

Whatever the Second Circuit decides, it is clear that the heady days of easily obtaining class certification are now gone. In cases in which the facts result in plaintiffs being situated differently, class certification is increasingly likely to be out of reach for plaintiffs. And the stakes are high for all involved. Class certification "turns a \$200,000 dispute...into a \$200 million dispute...and may induce a substantial settlement even if the [plaintiff's] position is weak," while the denial of class certification "may sound the 'death knell' of the litigation on the part of plaintiffs."<sup>35</sup> The Second Circuit's ruling is sure to be closely watched, as it will powerfully affect both plaintiffs and defendants in putative employment class actions.

### Endnotes

1. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011).
2. *Id.* (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)).
3. 133 S. Ct. 1426 (2013).
4. *Id.* at 1433.
5. *Roach v. T.L. Cannon Corp.*, No. 10 Civ 0591 (N.D.N.Y. Mar. 29, 2013).
6. *Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578 (S.D.N.Y. 2013).
7. Oral argument, which had been scheduled for May 14, 2014, has been adjourned and not yet re-scheduled (as of April 1, 2014).
8. Fed. R. Civ. P. 23(a).
9. *Wal-Mart Stores*, 131 S. Ct. at 2548-49.
10. Rule 23(b)(1) allows an action to be maintained as a class action if "the prosecution of separate actions by or against individual members of the class would create the risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class." Fed. R. Civ. P. 23(b)(1). And Rule 23(b)(2) allows a class to be certified if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Id.* 23(b)(2).
11. Fed. R. Civ. P. 23(b)(3).



12. *Id.* at 1430 (citation omitted).
13. *Id.* at 1431.
14. *Behrend v. Comcast Corp.*, 655 F.3d 182, 207 (3d Cir. 2011).
15. *Comcast*, 133 S. Ct. at 1432 (citations omitted).
16. *Id.*
17. *Id.* at 1433.
18. *Id.* (emphasis in original).
19. *Id.*
20. *Id.* at 1436 (Ginsburg J. and Breyer J., dissenting).
21. *Id.*
22. Appellant's Br. 1, 20-21.
23. *Id.* at 14.
24. *Id.* at 20.
25. NELA Brief at 3.
26. *Id.* at 22-23.
27. *Jacob v. Duane Reade*, 289 F.R.D. 408, 413-18 (S.D.N.Y. 2013) (*Jacob I*).
28. *Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578 (S.D.N.Y. 2013) (*Jacob II*).
29. Rule 23(c)(4) states that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." Fed. R. Civ. P. 23(c)(4).
30. *Jacob II*, 293 F.R.D. at 588-89.
31. *Id.* at 585-86.
32. *Id.* at 589.
33. *In re Nassau County Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006) ("a court may employ subsection (c)(4) to certify a class as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement.").
34. Defs. Appellants Br. and Special App. at SA-57.
35. *See Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001).

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