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Cover Page Footnote

J.D. Candidate, May 2014, Loyola Law School, Los Angeles; B.A. Philosophy, University of Washington, 2011. I wish to sincerely thank Professor Georgene Vairo, who first sparked my interest in class action litigation and mass dispute resolution, and whose guidance this Comment would not have been completed without. I would be remiss to not thank Julia Johnson, whose constant support and patience made this Comment possible.

COMCAST CORP. v. BEHREND: COMMON QUESTIONS VERSUS INDIVIDUAL ANSWERS—WHICH WILL PREDOMINATE?

*Daniel Jacobs**

I. WEIGHING IN

In *Comcast Corp. v. Behrend*,[1] the Supreme Court decertified a class exceeding two million previous and current Comcast subscribers in the Philadelphia Designated Market Area (DMA)[2] that accused Comcast of engaging in anticompetitive conduct violating the Sherman Act.[3] A district court certified the class pursuant to Federal Rule of Civil Procedure ("Rule") 23(b)(3),[4] and the Third Circuit affirmed.[5] The same five-member majority as in *Wal-Mart Stores, Inc. v. Dukes*,[6] in an opinion written by the same Supreme Court Justice who had penned the majority opinion in *Wal-Mart* held that the district court had not used enough scrutiny when determining whether class certification was appropriate.[7]

Part II provides a brief primer on class action procedure followed by a glance at the relatively recent change in the Court's approach to class action certification manifested in its seminal

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1. 133 S. Ct. 1426 (2013).

2. The Philadelphia DMA consists of eighteen counties in Pennsylvania, Delaware, and New Jersey. *See id.* at 1430 n.1. DMA is a term used "to define a broadcast-television market." *Id.*

3. *Id.* at 1429–30.

4. *Id.*; FED. R. CIV. P. 23(b)(3). While class actions can be and are utilized in state courts pursuant to state procedural rules, this Comment limits its discussion to class actions in the federal courts.

5. Behrend v. Comcast Corp., 655 F.3d 182, 185 (3d Cir. 2011), *rev'd*, 133 S. Ct. 1426 (2013).

6. 131 S. Ct. 2541 (2011).

7. *See Comcast*, 133 S. Ct. at 1432–33.

Wal-Mart decision.[8] Part III discusses the factual and procedural background of *Comcast* by examining what occurred in the district court and the Third Circuit.[9] Part IV analyzes the Supreme Court's majority and dissenting opinions.[10] Part V continues with the brunt of this Comment's argument[11] before briefly concluding.[12]

Comcast sought review to resolve whether a court can certify a class without resolving "merits arguments" that pertain to the class certification prerequisites pursuant to Rule 23.[13] The Court granted certiorari to resolve whether a court can certify a class without determining whether the party seeking class certification has introduced admissible evidence sufficient to show compliance with Rule 23.[14] The majority opinion then answered a slightly different question, focusing on whether admissible evidence had been introduced to show compliance with a requirement for (b)(3) classes in an antitrust context.[15]

Given this odd series of events surrounding the question to be addressed by the Court, it is not surprising that the majority's answer is both confusing and contrary to what has been black-letter law.[16] To get a class certified under Rule 23(b)(3), the party seeking class certification must show that questions relating to the class as a whole "predominate" over questions pertaining to individual class members.[17] Traditionally, individualized damage calculations have not been sufficient, by themselves, to prevent satisfaction of predominance.[18]

In his opinion, Justice Scalia explicitly identifies individualized damage calculations as "inevitably" outweighing common questions, thus precluding (b)(3) predominance.[19] However, the majority opinion makes no mention of changing black-letter law, and instead

8. *See infra* Part II.
9. *See infra* Part III.
10. *See infra* Part IV.
11. *See infra* Part V.
12. *See infra* Part VI.
13. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1435 (2013) (Ginsburg & Breyer, JJ., dissenting).
14. *Id.*
15. *Id.* at 1431 n.4 (majority opinion).
16. *See infra* Part V.
17. *See* FED. R. CIV. P. 23(b)(3).
18. *See* 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:54 (5th ed. 2013).
19. *See Comcast*, 133 S. Ct. at 1433.

claims its decision is a "straightforward application of class-certification principles."[20] By applying class action principles to reach a decision that is facially contradictory black-letter law, the *Comcast* Court left class action jurisprudence with another unanswered question: What is the relationship between individualized damages and predominance in (b)(3) classes?[21]

This Comment argues that the majority opinion has created uncertainty in the federal courts because it is poorly drafted, and this inattention to detail will eventually require Supreme Court clarification.[22] By analyzing two class actions involving Whirlpool washing machines[23] that were remanded to the circuit courts for reconsideration in light of *Comcast*, this Comment closes by showing how circuits around the country are reacting to the decision and using issue classes[24] to avoid the confusion the opinion created.[25]

II. PRIMER AND *WAL-MART*

A. What Is a Class Action?

A class action is a mechanism whereby one individual can participate in court on behalf of a large group of individuals, in contrast to the general rule that litigation shall be done on an individual basis.[26] To proceed in this collective form of litigation, the party seeking to have the class certified must satisfy Rule 23 requirements.[27]

Rule 23(a) sets out four elements that the party seeking class certification must demonstrate to get the class certified: numerosity, commonality, typicality, and adequacy of representation.[28] Numerosity requires the class to be too large for all members to be

20. *See id.*

21. This Comment makes no attempt to answer this question. This Comment instead focuses on how the Court managed to "un-answer" a question that many had thought was already resolved.

22. *See infra* Part V.

23. Butler v. Sears, Roebuck & Co., 727 F.3d 796 (7th Cir. 2013); *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838 (6th Cir. 2013).

24. *Issue class* refers to a class that is certified only regarding a particular issue in the dispute. *See* FED. R. CIV. P. 23(c)(4).

25. *See infra* Part V.B.

26. *Comcast*, 133 S. Ct. at 1432.

27. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2548 (2011).

28. *See* FED. R. CIV. P. 23(a); *Wal-Mart*, 131 S. Ct. at 2550.

joined via traditional mechanisms.[29] Commonality requires the entire class to share common "questions of law or fact."[30] Typicality requires the class representative to share legal claims or defenses with the class as a whole.[31] Adequacy of representation requires the class representative to "fairly and adequately protect the interests of the class."[32]

In addition to the requirements laid out in 23(a),[33] a party seeking class certification must also satisfy one of the three provisions set out in 23(b), depending on both the underlying claims and the relief sought.[34] The first two provisions are intended for classes seeking primarily injunctive or declaratory relief, while the third provision is meant for classes seeking monetary damages.[35]

To certify a class pursuant to 23(b)(3),[36] the party seeking class certification must show that those questions common to the class "predominate over any questions affecting only individual class members"[37] and that using a class action is the "superior" method of resolving or addressing the dispute.[38] The rule goes on to list four non-exhaustive factors that are to be considered when making both the predominance and the superiority determinations,[39] but most courts use the four factors solely in the superiority analysis.[40]

The importance of the Court's decision in *Comcast* can only be fully appreciated once viewed as part of a trend toward an ever-rising burden that parties seeking class certification must meet. The next section examines the emergence of this "'rigorous analysis'"[41] and

29. *See* FED. R. CIV. P. 23(a)(1).

30. FED. R. CIV. P. 23(a)(2); *see infra* Part II.B.2.

31. *See* FED. R. CIV. P. 23(a)(3); JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 4:16 (2012).

32. FED. R. CIV. P. 23(a)(4).

33. Some courts have held, as an unwritten threshold requirement to class certification, that the class must be ascertainable, namely that there be some sort of mechanism to determine who is a class member and who is not. *See* 2 RUBENSTEIN, *supra* note 18, §§ 3:2, 3:3.

34. FED. R. CIV. P. 23(b).

35. *See* MANUAL FOR COMPLEX LITIGATION § 21.221 (4th ed., 2004).

36. Because the class at issue in *Comcast* was a (b)(3) class, this Comment will limit its discussion to (b)(3) classes.

37. FED. R. CIV. P. 23(b)(3).

38. *Id.*

39. *See* FED. R. CIV. P. 23(b)(3)(A)–(D); 2 RUBENSTEIN, *supra* note 18, § 4:68.

40. *See* 2 RUBENSTEIN, *supra* note 18, § 4:68.

41. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160–61 (1982)).

what class certification looked like before and after the Court's decision in *Wal-Mart*.

B. Landscape

The party seeking class certification has the burden of demonstrating to the court that the putative class satisfied the Rule 23 requirements.[42] Because the class action is merely a procedural tool for pursuing claims based on substantive law, the evidence pertaining to those claims is theoretically distinct from the evidence demonstrating the propriety of class certification.[43] A problem arises when the evidence overlaps, and thus the question becomes whether, and to what extent, the merits-related evidence can be examined in the class certification inquiry.

1. Pre-*Wal-Mart*

The Supreme Court's 1974 decision in *Eisen v. Jacquelin & Carlisle*[44] included a statement[45] that courts interpreted for many years to mean that consideration of the merits, and in turn, evidence relating to such merits, is flatly prohibited during the class certification decision.[46] In 1982, the Supreme Court explicitly stated that this blanket prohibition was not the rule,[47] but the Court's earlier statement seemed to have more staying power.

2. *Wal-Mart*

In *Wal-Mart*, the Supreme Court decertified a class of 1.5 million female Wal-Mart employees suing Wal-Mart for alleged gender discrimination in its promotion practices.[48] The Court held that the class should not have been certified because, among other failings, the class did not satisfy the commonality requirement.[49]

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42. FED. R. CIV. P. 23(a); *see Wal-Mart*, 131 S. Ct. at 2551 ("A party seeking class certification must affirmatively demonstrate his compliance with [Rule 23]").

43. *See* MCLAUGHLIN, *supra* note 31, at § 3:12.

44. 417 U.S. 156 (1974).

45. "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.* at 177.

46. *See* RICHARD A. NAGAREDA, THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 273–76 (2009).

47. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982).

48. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011).

49. *See id.* at 2556–57.

Justice Scalia, writing for the five-member majority, explained that commonality did not require just common *questions* of law or fact, but rather common *answers* to those questions.[50] Furthermore, a common answer must sufficiently connect to the case's core issues so that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[51]

In clarifying that the district court must conduct a "rigorous analysis" when examining whether Rule 23 requirements are satisfied,[52] the Court explained that such rigor would commonly require examination of the claim's underlying merits.[53] In a footnote, the Court characterized its statement in *Eisen* as "the purest dictum"[54] and reiterated that examination of the merits during the class inquiry is not only permissible but is in fact frequently necessary.[55]

3. Post-*Wal-Mart*

Immediately following the Supreme Court's decision, courts of appeal began decertifying previously certified classes claiming that the district courts had not conducted sufficiently rigorous scrutiny.[56] Class certification became undoubtedly more difficult, and while some courts applied *Wal-Mart* broadly in decertifying classes,[57] others did everything they could to distinguish the decision with a wide enough berth as to deem it inapplicable.[58]

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50. *See id.* at 2551 ("'What matters to class certification . . . is not the raising of common "questions"—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" (quoting Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009))).

51. *Id.*

52. *Id.* at 2551–52 (citing *Falcon*, 457 U.S. at 160).

53. *Id.*

54. The Court explained that the statement in *Eisen* was in a different context. The judge in that case had looked at the merits during the class certification stage in order to shift the cost of notice from the plaintiff to the defendant. The judge was not looking behind the pleadings in order to determine whether class certification was appropriate. *Id.* at 2552 n.6.

55. *Id.* at 2552 & n.6.

56. *See* M.D. *ex rel* Stukenberg v. Perry, 675 F.3d 832 (5th Cir. 2012); Ellis v. Costco Wholesale, Corp., 657 F.3d 970 (9th Cir. 2011).

57. *See* DL v. District of Columbia, 713 F.3d 120 (D.C. Cir. 2013); *In re* Countrywide Fin. Corp. Mortg. Lending Practices Litig., 708 F.3d 704 (6th Cir. 2013); Luiken v. Domino's Pizza, LLC, 705 F.3d 370 (8th Cir. 2013).

58. *See In re* U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108 (2d Cir. 2013); Johnson v. Meriter Health Servs. Emp. Ret. Plan, 702 F.3d 364 (7th Cir. 2012); McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012).

III. IT'S ABOUT THE JOURNEY, NOT THE DESTINATION

After examining what occurred in the district court, this Comment goes on to look at what the Third Circuit did to set the stage for the Supreme Court's decision.

A. District Court

Beginning in 1998, Comcast used a strategy called "clustering"[59] to increase its subscription rates in the Philadelphia area.[60] Clustering involves trading geographic regions of the market with competitors to solidify control in a particular larger region.[61] Some Comcast subscribers in the Philadelphia DMA sought to certify a (b)(3) class[62] and recover damages from Comcast as a result of this clustering, which they alleged violated antitrust law.[63] According to the subscriber plaintiffs, Comcast's clustering removed competitors from the Philadelphia DMA and maintained prices above competitive levels, thus forcing the putative class to pay higher rates for cable television, and these higher rates constitute the damages alleged.[64]

In seeking certification of a (b)(3) class, the plaintiffs needed to establish predominance, which, in the antitrust context, requires a two-pronged analysis.[65] First, the plaintiffs needed to show that the antitrust impact[66] could be established at trial through evidence common to the *entire* class.[67] Second, the plaintiffs needed to show that the damages resulting from said antitrust impact could be

59. Clustering is defined by the majority as "a strategy of concentrating operations within a particular region." Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1430 (2013).

60. Behrend v. Comcast Corp., 264 F.R.D. 150, 156–57 (E.D. Pa. 2010), *rev'd*, 133 S. Ct. 1426.

61. *See* Richard A. Epstein, *The Precarious Status of Class Action Antitrust Litigation After* Comcast v. Behrend, POINTOFLAW.COM (Apr. 8, 2013), http://pointoflaw.com/columns/2013/04/the-precarious-status-of-class-action-antitrust-litigation-after-comcast-v-behrend.php.

62. Judge Padova certified the following class: "All cable television customers who subscribe or subscribed at any times since December 1, 1999, to the present to video programming services (other than solely to basic cable services) from Comcast, or any of its subsidiaries or affiliates in Comcast's Philadelphia cluster." *Id.* at 191.

63. *Id.* at 156.

64. *Id.* at 156–57.

65. *Id.* at 156.

66. "Individual injury (also known as antitrust impact) is an element of the cause of action; to prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation." Behrend v. Comcast Corp., 264 F.R.D. 150, 156 (E.D. Penn. 2010).

67. *See Behrend*, 264 F.R.D. at 156–57.

measured "on a class-wide basis" through use of a "common methodology."[68]

The plaintiffs presented four nonexclusive theories of antitrust impact in an effort to satisfy the first prong of the predominance analysis.[69] In the end, the district court certified the class but only recognized one of the four theories as being susceptible to class-wide proof at trial.[70] This theory argued that Comcast's clustering reduced competition from "overbuilders"[71] to such a degree as to cross the line into violating antitrust law.[72] Overbuilders are competitors who attempt to provide services in an area that is already dominated by a provider.

The plaintiffs presented a model prepared by Dr. James McClave in an attempt to satisfy the second requirement: that damages be measurable on a class-wide basis.[73] McClave's model used regression analysis to show what prices the putative class members would have paid but for Comcast's allegedly illegal clustering and used those prices to determine the damages.[74] However, McClave's model determined the "what-if" price by incorporating all four theories of antitrust impact, not just the overbuilder theory accepted for class certification purposes.[75] Moreover, the model did not establish what the damages would be using only the overbuilder theory.[76] Thus, Comcast argued that the model was inadequate to establish that the damages were measurable class wide.[77]

In granting class certification, the district court specifically addressed this feature of the model and held that it did not "impeach"

68. *Id.* at 154.

69. *Id.* at 156–57.

70. *Id.* at 191. The court did not reject the other three theories for being implausible or for failing to establish antitrust impact, but rather because they were not susceptible to class-wide proof. *See Comcast*, 133 S. Ct. at 1430–31 & n.3.

71. *Behrend*, 264 F.R.D. at 157 (defining the term "overbuilders" as "rival wireline providers of multichannel video programming service").

72. *See id.* at 166–75.

73. *See id.* at 181–83.

74. *Id.*

75. *See Comcast*, 133 S. Ct. at 1431.

76. *See id.*

77. *Behrend*, 264 F.R.D. at 190–91.

the model sufficiently to merit denial of class certification.[78] Comcast appealed the class certification to the Third Circuit.[79]

B. Court of Appeals

On appeal, Comcast emphasized the same issues with McClave's model as it had done in the district court, arguing that the model's failure to identify damages specifically resulting from the overbuilder theory meant that the plaintiffs had not demonstrated compliance with the predominance analysis's second prong.[80] The Third Circuit affirmed the class certification and held that the district court had not abused its discretion in certifying the class.[81]

After affirming that a court must conduct a "rigorous analysis" in determining whether the class certification requirements are met,[82] the Third Circuit cited one of its earlier opinions[83] to clarify that merits-related inquiry during the class certification stage is permissible.[84] However, the court went on to say that such inquiry is only allowed to the extent necessary to determine Rule 23 compliance.[85]

The court explained that at the class certification stage, the plaintiffs did not need to prove the existence of antitrust impact—only that such impact could be proven at trial through evidence common to the entire class.[86] The Third Circuit stated that Comcast had asked the court to examine the plaintiffs' evidence to a degree that was not required at the class certification stage.[87]

In regards to McClave's model, the Third Circuit explained that the model did not need to show *what* the class-wide damages would be but rather only that class-wide damages *could* be measured using a common methodology.[88] The Third Circuit stated that Comcast's

78. *Id.*
79. *See* Behrend v. Comcast Corp., 655 F.3d 182 (3d Cir. 2011), *rev'd*, 133 S. Ct. 1426.
80. *See id.* at 201–02.
81. *Id.* at 185.
82. *Id.* at 190 (quoting *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 318 (3d Cir. 2008)).
83. *Hydrogen Peroxide*, 552 F.3d 305 (3d Cir. 2008).
84. *See Behrend*, 655 F.3d at 190.
85. *See id.*
86. *Id.* at 197 (quoting *Hydrogen Peroxide*, 552 F.3d at 311–12).
87. *See id.*
88. *See id.* at 203–04, 207.

contentions regarding the model were solely in regard to the study's "merits," and because the model's validity did not relate to Rule 23 compliance, such examination was not warranted during the class certification stage.[89] The Third Circuit concluded that Comcast's arguments about the model did not relate to the inquiry required during the class certification stage,[90] and thus the district court had not abused its discretion in certifying the class.[91]

IV. THE OPINIONS

As mentioned earlier, the 5–4 split of the justices in *Comcast* paralleled the split in *Wal-Mart*,[92] which in turn coincides with "ideological lines."[93] Before delving into the majority and dissenting opinions, it is helpful to briefly discuss the amorphous question presented.

A. Lack of Common Question Presented

As this Comment alluded to earlier on,[94] Comcast initially asked the Court to resolve whether a class can be certified absent resolution of "merits arguments" pertinent to Rule 23 compliance.[95] The Court decided to answer a slightly different question,[96] and the oral argument consisted almost entirely of a debate about the question being asked of the Court.[97] As such, Justices Ginsburg and Breyer excoriated the majority for answering a question that had not been

89. *See Hydrogen Peroxide*, 552 F.3d at 316–17 (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974)) (describing the Supreme Court's rule prohibiting consideration of the merits as not "necessary" for purposes of Rule 23).

90. *See Behrend*, 655 F.3d at 206–07.

91. *Id.* at 207.

92. *Compare* Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013), *with* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (exemplifying how these two cases both had the same split between the justices in their holdings).

93. *See Comcast Corp v. Behrend*, THE OYEZ PROJECT AT IIT CHICAGO-KENT COLLEGE OF LAW (Aug. 25, 2013), http://www.oyez.org/cases/2010-2019/2012/2012_11_864%23argument (sorting the justices' opinions based on their traditional ideologies).

94. *See supra* Part I.

95. Petition for a Writ of Certiorari at i, Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013) (No. 11-864), 2012 WL 105558, at *i.

96. "'Whether a district court may certify a class action without resolving whether the plaintiff class had introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.'" Comcast Corp. v. Behrend, 133 S. Ct. 24 (2012).

97. Oral Argument, Comcast Corp. v. Behrend, 133 S. Ct. 1426 (No. 11-864), *available at* http://www.oyez.org/cases/2010-2019/2012/2012_11_864.

asked[98] and connected this error on the Court's part to several other reasons why certiorari should have been dismissed as improvidently granted.[99] The plasticity of the question presented thus infected the majority opinion,[100] prompting the majority to devote a footnote to addressing the dissenting justices' concerns.[101]

B. Majority Opinion

After briefly examining the facts,[102] the Court began its analysis by identifying the class action as "'an exception to the usual rule'" of individualized litigation.[103] Citing to *Wal-Mart*, the Court reiterated that the party seeking class certification must "affirmatively demonstrate" compliance with Rule 23 and support such demonstrations "through evidentiary proof."[104]

Justice Scalia went on to quote his own opinion in *Wal-Mart*, stating that an inquiry into the merits was not off limits during the class certification stage.[105] The majority then said that examination of the merits during the class certification stage would, in fact, be quite common in order for the district court to conduct the required rigorous analysis.[106]

The Court declared that the class certification by the district court was improper, as was the Third Circuit's affirmation of the certification.[107] According to the majority, the Third Circuit refused to address Comcast's argument about McClave's model solely because it overlapped with the merits and "simply concluded" that McClave's model demonstrated the second prong of antitrust predominance.[108] The majority construed this approach as permitting "*any* method of measurement . . . so long as it can be applied

98. *See Comcast*, 133 S. Ct. at 1435–36 (Ginsburg & Breyer, JJ., dissenting).
99. *See infra* Part IV.C.
100. *See Comcast*, 133 S. Ct. at 1435–41 (Ginsburg & Breyer, JJ., dissenting).
101. *Id.* at 1431 n.4 (majority opinion).
102. *Id.* at 1429–31.
103. *Id.* at 1432 (quoting Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979)).
104. *Id.* (citing Wal-Mart Stores v. Dukes, 131 S. Ct. 2541, 2551–52 (2011)).
105. *Id.* at 1432–33.
106. *See id.* at 1432.
107. *Id.* at 1432–33.
108. *Id.*

classwide."[109] Justice Scalia warned that this approach would "reduce [the] predominance requirement to a nullity."[110]

The majority went on to state that the district court had made an erroneous conclusion: McClave's model failed to establish predominance due to its failure to identify damages specifically attributable to the overbuilder theory.[111] Because the plaintiffs had relied solely on McClave's model to establish the second prong of antitrust predominance, the model's failure meant "individual damage calculations will *inevitably overwhelm* questions common to the class."[112]

According to the majority, had the plaintiffs won at trial, they would only have been entitled to damages resulting from the overbuilder-related clustering.[113] As such, the Court declared that a model purporting to show that damages are measurable on a class-wide basis should measure only the damages stemming from the overbuilder conduct.[114] Because McClave's model did not attempt to isolate such calculations, the model could not purport to show that damages are measurable class wide under the theory of liability remaining in the case.[115]

C. Dissenting Opinion

The dissenting opinion began by clarifying that the majority's reformulation of the question presented was sufficient by itself to merit dismissing certiorari as improvidently granted.[116] However, the new question presented addressed the admissibility of evidence, and because Comcast did not object to McClave's model during the class certification stage, the dissent argued that Comcast waived any objection to its admission.[117] Thus, the dissent identified another reason why certiorari should have been dismissed.[118]

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109. *Id.*
110. *Id.*
111. *Id.* at 1433–35.
112. *Id.* at 1433 (emphasis added).
113. *Id.*
114. *Id.*
115. *See id.* at 1433–34.
116. *Id.* at 1435 (Ginsburg & Breyer, JJ., dissenting).
117. *See id.* at 1435–36.
118. *Id.* at 1436.

In addressing the majority opinion, the dissent clarified that the Court "breaks no new ground" vis-à-vis (b)(3) class certification.[119] The dissent argued that measurability of class-wide damages through a common methodology is not a prerequisite to class certification.[120] Instead, a class could be certified solely for a determination of liability,[121] leaving the damages calculations to be done on a subsequent individual basis.[122]

Furthermore, the dissent stated that as a matter of black-letter law, individual damages still do not, by themselves, preclude (b)(3) certification.[123] For the remainder of the dissent, the justices criticized the majority's decision as a matter of substantive antitrust law.[124]

V. ANALYSIS

As this Comment explores below, the majority opinion in *Comcast* significantly distorts what occurred in the lower courts[125] and makes the opinion difficult to interpret and apply due to the use of imprecise wording when making important statements of class action law.[126] Consequently, federal courts have found ways to avoid the *Comcast* confusion through the use of issue classes under (c)(4), as exemplified by the Sixth and Seventh Circuits in recent decisions interpreting *Comcast*.[127]

A. Individual Damages Versus Predominance

1. Third Circuit Corrected

The majority repeatedly referred to the Third Circuit's rubber-stamping of McClave's model, as though the Third Circuit made some blanket statement about *Eisen* prohibiting merits-related

119. *Id.*

120. *Id.*; *see infra* Part V.A.

121. *See Comcast*, 133 S. Ct. at 1437 (Ginsburg & Breyer, JJ., dissenting).

122. *See id.* "When appropriate, an action may be brought or maintained as a class action with respect to particular issues." FED. R. CIV. P. 23(c)(4); *see infra* Part V.B.

123. *See Comcast*, 133 S. Ct. at 1436–37 (Ginsburg & Breyer, JJ., dissenting).

124. *See id.* at 1437–41.

125. *See infra* Part V.A.1.

126. *See infra* Part V.A.2.

127. *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838 (6th Cir. 2013); Butler v. Sears, Roebuck & Co., 727 F.3d 796 (7th Cir. 2013); *see infra* Part V.B.

inquiries.[128] However, the Third Circuit did the exact opposite, repeatedly citing to its earlier decision in *In re Hydrogen Peroxide* for the extent to which such a merits-related inquiry is permissible.[129] Furthermore, the Third Circuit did not reject all of Comcast's arguments about McClave's model—only the ones challenging the model's "methodology."[130]

The Third Circuit did not "simply conclude[]" that McClave's model satisfied the plaintiffs' burden.[131] It identified the specific burden on the putative class at that stage[132] and determined that McClave's model satisfied *that* burden.[133] The majority made no mention of that holding and instead labeled the Third Circuit as accepting any possible method of calculation.[134]

The majority simply declared that McClave's model failed to establish the second prong of antitrust predominance[135] because, if used, the model would not accurately predict the class's damages.[136] This is empirically false. McClave's model used a formula that estimated the entire class's damages.[137] The estimate was bloated because the model took account of variables that it should not have included.[138] However, the model still produced an estimate of class-wide damages.[139] This estimate was all that was required under *Hydrogen Peroxide*,[140] which seems to remain good law today.

2. Antitrust Predominance or All Predominance?

The majority stated that predominance was not satisfied because individualized calculation of damages "inevitably overwhelm[ed]" common class-wide questions.[141] This is certainly a correct statement

128. *See supra* Part IV.B.
129. *See* Behrend v. Comcast Corp., 655 F.3d 182, 190 (3d Cir. 2011), *rev'd*, 133 S. Ct. 1426 (2013).
130. *See id.* at 206–07.
131. *See Comcast*, 133 S. Ct. at 1433.
132. *See Behrend*, 655 F.3d at 197 (citing *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311–12 (3d Cir. 2008)).
133. *See id.* at 199–206.
134. *See Comcast*, 133 S. Ct. at 1433.
135. *See id.* at 1433–34.
136. *See id.* at 1433–35.
137. *See id.*
138. *See id.* at 1438–39 (Ginsburg & Breyer, JJ., dissenting).
139. *Id.* at 1440–41.
140. *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311–12 (3d Cir. 2008).
141. *See Comcast*, 133 S. Ct. at 1433.

of law for antitrust class actions, for it reflects the two-pronged predominance analysis required in such cases. However, Justice Scalia went on to say that the dissent's discussion of substantive antitrust law was unwarranted.[142] Thus, the question becomes whether "predominance" is meant to refer to antitrust-specific predominance or to predominance in all (b)(3) class actions.[143]

The dissent stated that the majority's statements only applied to antitrust cases,[144] but it is far from clear that Justice Scalia intended the statements to be limited in scope.

The dissent said the black-letter rule remains the same: individual damages calculations do not preclude (b)(3) class certification.[145] Unfortunately, it is uncertain whether the majority in *Comcast* left that intact. However, the Sixth and Seventh Circuits recently made clear that they are not going to wait for an answer and have sought to avoid the damages issue entirely through issue classes.[146]

B. Front-Loading Washing Machines and Rule 23(c)(4)

1. Sixth Circuit

Two Ohio consumers brought a class action against Whirlpool over allegedly defective washing machines that failed to properly self-clean, thus resulting in mold buildup in the machine and on clothes, leading to various unpleasant cleanliness and respiratory issues.[147] The district court certified a liability class of Ohio consumers and specifically set aside damages determinations for after the liability phase.[148] Whirlpool appealed the class certification, and the Sixth Circuit affirmed the lower court's decision.[149] Whirlpool appealed to the Supreme Court, which remanded the case to the Sixth Circuit for reconsideration in light of its decision in

142. *Id.*
143. *Id.* at 1432.
144. *See id.* at 1440 (Ginsburg & Breyer, JJ., dissenting).
145. *Id.* at 1437.
146. *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838 (6th Cir. 2013); Butler v. Sears, Robeuck & Co., 727 F.3d 796 (7th Cir. 2013).
147. *In re Whirlpool*, 722 F.3d at 844.
148. *Id.*
149. *Id.*

Comcast.[150] In July 2013, the Sixth Circuit again affirmed the class certification, holding that *Comcast* did not make the class certification improper.[151]

The Sixth Circuit explained that, unlike the class in *Comcast*, the class of Whirlpool consumers had been certified for liability purposes *only*, with determination of damages to be done on an individual basis only after, and if, Whirlpool was found liable.[152] As such, individualized damages calculations could not scuttle predominance because they never had been included in the class certification in the first place.[153] Thus, the Court's decision in *Comcast* has "limited applica[bility]" and is inapplicable to cases where classes are certified for liability purposes only.[154]

2. Seventh Circuit

A multi-state consumer class brought claims identical to those from *In re Whirlpool* against Sears and Kenmore, alleging that the front-loading Kenmore and Sears washing machines were defective and produced mold buildup.[155] The district court similarly certified the class for liability purposes only per Rule 23(c)(4), intending the damages to be determined individually should liability be found[156] The case followed the exact same procedural path as *In re Whirlpool*,[157] with the Supreme Court remanding both cases to the circuits for reconsideration.[158]

Judge Richard Posner wrote the majority opinion for the Seventh Circuit, reaffirming the class certification and holding, as the Sixth Circuit had,[159] that *Comcast* did not require decertification.[160] He concluded that calculation of individual damages cannot predominate over anything when the class seeks certification solely for liability determination, and thus the holding

150. *Id.* at 845.
151. *Id.*
152. *Id.* at 860–61.
153. *Id.* at 861.
154. *Id.* at 860.
155. Butler v. Sears, Roebuck & Co., 727 F.3d 796, 797 (7th Cir. 2013).
156. *Id.* at 800.
157. *Compare In re Whirlpool*, 722 F.3d 838, *with Butler*, 727 F.3d 796.
158. *Compare* Sears, Roebuck & Co. v. Butler, 134 S. Ct. 1277 (2014), *with* Whirlpool Corp. v. Glazier, 134 S. Ct. 1277 (2014).
159. *In re Whirlpool*, 722 F.3d at 860–61.
160. *Butler*, 727 F.3d at 798–800.

from *Comcast* does not apply to issue classes for liability purposes.[161]

VI. CONCLUSION

Thus, the washing machine cases serve to illuminate a mechanism to avoid grappling with the unclear morass left by *Comcast*. This Comment makes the case that the Court's opinion is sloppy and unclear, arguing that this inattention to detail created confusion about whether individual damages calculations defeat predominance. Finally, this Comment highlighted an approach exemplified by the Sixth and Seventh Circuits: certifying the class for liability only. The Supreme Court has never explicitly addressed (c)(4) and the parameters of its use, but the decision in *Comcast* will force the Court to address issue classes in its next class action decision.

161. *Id.* at 800.