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## No Damages Or Injury, No Predominance And No Class

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The U.S. Supreme Court's decision in [Comcast Corp. v. Behrend](#), 133 S. Ct. 1426 (2013) is significant. The court confirmed that Federal Rule of Civil Procedure 23 requires proof that damages and injury are amenable to class treatment before a class can be certified. *Id.* at 1432.



Dennis S. Ellis

In an effort to downplay the importance of Comcast, the plaintiffs' bar has been clinging to Justice Ruth Bader Ginsburg's commentary in dissent, that Comcast "breaks no new ground on the standard for certifying a class action under [Rule] 23(b)(3)." *Id.* at 1436 (Ginsburg, J. dissenting). However, this is becoming harder for plaintiffs to do each day, as more and more district courts are relying on Comcast to deny class certification.

Comcast's broad reach has been felt beyond the district courts. Most recently, in *In re: Rail Freight Fuel Surcharge Antitrust Litigation – MDL No. 1869*, No. 12-7085, 2013 U.S. App. LEXIS 16500 (D.C. Cir. Aug. 9, 2013), the United States Court of Appeals for the District of Columbia Circuit confirmed that Comcast has established a higher standard for plaintiffs seeking to pursue a class action, requiring that plaintiffs establish not only classwide proof of damages, but also injury.

### Comcast Corp. v. Behrend Shifted the Consumer Class Action Landscape

In Comcast, the district court had certified a class of 2 million current and former residential and commercial Comcast cable television subscribers seeking damages under Rule 23(b)(3). 133 S. Ct. at 1429-30.

Rule 23(b)(3) permits class certification only where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

Interpreting Rule 23(b)(3), the district court held that plaintiffs must "show (1) that the existence of individual injury ... was 'capable of proof at trial through evidence that [was] common to the class rather than individual to its members'; and (2) that the damages ... were measurable 'on a class-wide basis' through use of a 'common methodology.'" Comcast, 133 S. Ct. at 1430 (alterations in original). The Court of Appeals did not contradict this interpretation. *Id.* at 1431. Nor, for that matter, did the Supreme Court.

However, the Supreme Court cautioned that class certification is impossible if the plaintiff fails to "affirmatively demonstrate his compliance' with Rule 23." *Id.* at 1432. Where the plaintiff seeks to certify a class under Rule 23(b), lower courts must perform analyses that

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are “even more demanding than Rule 23(a)”, and must “take a ‘close look’ at whether common questions predominate over individual ones.” *Id.*

Though the Supreme Court focused its facts-specific discussion on the model proposed by the plaintiffs for measuring damages, the court noted that Rule 23(b)(3) obligates plaintiffs to establish “injury” as a prerequisite for awarding damages. *Id.* at 1433-34. Even the dissent acknowledged that Rule 23(b)(3) requires proof of a classwide injury. *Id.* at 1436.

### **Rail Freight Fuel Surcharge Antitrust Litigation Confirms Comcast’s Far-Reaching Impact**

On Aug. 9, 2013, the United States Court of Appeals for the District of Columbia issued an opinion confirming that Comcast and Rule 23 require proof of injury on a classwide basis before certification.

In *In re: Rail Freight Fuel Surcharge Antitrust Litigation*, a group who shipped products via rail and were forced to pay rate-based fuel surcharges by major freight railroads filed a lawsuit alleging collusion and price fixing. *Id.*, 2013 U.S. App. LEXIS 16500 at \*1-4. They then sought to certify a class under Rule 23(b)(3) and offered an expert’s opinion quantifying the class members’ alleged damages. *Id.* at \*8-10.

The district court granted certification. *Id.* at \*10. On appeal, the D. C. Circuit held that Rule 23(b)(3) compels plaintiffs to “show that they can prove, through common evidence, that all class members were in fact injured ...” because “[w]hen a case turns on individualized proof of injury, separate trials are in order.” *Id.* at \*17. Noting that the Supreme Court’s decision in Comcast “clarified the law of class actions,” the court observed:

It is now indisputably the role of the district court to scrutinize the evidence before granting certification, even when doing so “requires inquiry into the merits of the claim.” [Comcast Corp.,] 133 S. Ct. at 1433. If the damages model cannot withstand this scrutiny then, that is not just a merits issue. [Plaintiffs’ damages theories] are essential to the ... claim [that] they can offer common evidence of classwide injury. ... No damages model, no predominance, no class certification.

*Id.* at \*21.

District courts applying Comcast Corp. likewise have required a showing of classwide injury at the class certification stage. In *Torres v. Nutrisystem Inc.*, No. SACV 12-01854-CJC (JPRx), 2013 U.S. Dist. LEXIS 66444 (C.D. Cal. Apr. 8, 2013), for example, the district court denied class certification because the class members could not prove, on a classwide basis, that they had viable statutory claims.

Similarly, in *Diacakis v. Comcast Corp.*, No. C11-3002, 2013 U.S. Dist. LEXIS 64523 (N.D. Cal. May 3, 2013), the district court held that the class, which consisted of all purchasers of a cable package, was overbroad because it included putative plaintiffs that had not been deceived by the alleged representations and omissions and thus suffered no injury.

### **Practical Implications of Comcast Corp. and Rail Freight Fuel Surcharge Antitrust Litigation**

Corporations facing consumer class action lawsuits stand to benefit significantly from the Supreme Court's ruling in Comcast. As the D.C. Circuit explained in *In re: Rail Freight Fuel Surcharge Antitrust Litigation*, “[b]efore Behrend, the case law was far more accommodating to class certification ... courts had not treated the principle as intuitive in the past” *Id.* at \*25.

Now, it is clear that district courts cannot certify a class under Rule 23(b)(3) unless plaintiffs show a classwide method for establishing damages and injury. Certification absent classwide proof of both injury and damages is tantamount to certifying a class without predominance, undoubtedly an appealable issue.

—By Dennis S. Ellis, [Paul Hastings LLP](#)

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