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THE FUTURE OF CLASS ACTIONS IN THE WAKE OF *COMCAST V. BEHREND*

*Megan Toal**

INTRODUCTION

Class actions are a unique category of litigation; these types of cases are an exception to the rule that only named parties are subject to a disputed matter.¹ In 2013, the Supreme Court of the United States heard many class action suits, often disputes regarding certification of the class itself.² On March 27, 2013, the Supreme Court decided the antitrust class action suit *Comcast v. Behrend*.³ The central issue in *Comcast* involved the correct interpretation of Federal Rule of Civil Procedure 23.⁴ This particular rule was designed to “promote judicial economy” through the use of litigation of multiple plaintiffs who possess common questions of fact and law.⁵ Because class actions are a different type of

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¹ *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 155 (1982) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–03 (1979)) (noting “[t]he class-action device was designed as ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’”).

² Lawrence Hurley, *Analysis: Big business the winner in U.S. Supreme Court class action cases*, REUTERS (June 20, 2013), <http://www.reuters.com/article/2013/06/21/us-usa-court-classaction-idUSBRE95K01U20130621>, (detailing briefly the big class action disputes that the U.S. Supreme Court heard this past term, specifically the seven class actions that reached the Court which include: *Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct 1184 (2013), *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct 1345 (2013), *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct 1523 (2013), *Oxford Health Plans LLC v. Sutter*, 133 S. Ct 2064 (2013), *Maracich v. Spears*, 133 S. Ct 2191 (2013) and *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct 2304 (2013)).

³ *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

⁴ FED. R. CIV. P. 23.

⁵ *Falcon*, 457 U.S. at 160; *See also Califano*, 442 U.S. at 700 (holding that “the class action device saves the resources of both the courts and the parties by permitting an issue . . . to be litigated in an economical fashion under Rule 23).



litigation, it is repeatedly noted that the evidence necessary to satisfy the Rule 23 prerequisites for class certification requires a “rigorous analysis,” and thus the Court explored what this analysis entails.⁶

Class actions at the Supreme Court level, including *Comcast*, often lead to strong and heated divisions on the bench. The majority opinions [of the current Supreme Court] have generally sided with the defendants, which are often large corporations. As a result, many commentators classify the current Court as pro-business and consequently question the future of class actions.⁷ Some scholars argue that the class action lawsuit is simply progressing and adapting over time.⁸ From the inception of the current Rule 23 in 1966, there have been various phases of interpretation.⁹ While the rule had in its foundation the goal for judicial efficiency, in the early years that was simply not the case.¹⁰ Specifically, courts were faced with difficulties in assessing how best to manage these types of cases, especially when determining injury, causation, and damages.¹¹ During the first few decades, the Court focused on trying common issues and saving individual issues for later, which often led to an increased number of settle-

⁶ *Falcon*, 457 U.S. at 160; See D. Matthew Allen & Amanda Arnold Sansone, *The ‘Rigorous Analysis’ Overlay on Current Class Action Jurisprudence*, BLOOMBERG LAW, available at <http://about.bloomberglaw.com/practitioner-contributions/the-rigorous-analysis-overlay-on-current-class-action-jurisprudence/>, (describing the evolution of the rigorous analysis since the Rule 23 in current form was adopted in 1966).

⁷ Hurley, *supra* note 2.

⁸ Allen, *supra* note 6; See also John K. Rabiej, *The Making of Class Action Rule 23-What Were We Thinking?*, 24 MISS. C. L. REV. 323, 328 (2005) (noting the evolution of class action and attributing it to the high monetary stakes now attached to these types of claims, especially in the products liability and mass tort fields).

⁹ Allen, *supra* note 6 (describing the various stages of interpretation in how Rule 23 applies to the certification of class actions); See Robert Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. (forthcoming 2013), available at <http://ssrn.com/abstract=2297474> [hereinafter Bone, *Misguided*] (explaining the evolution of courts’ interpretations of Rule 23 since the modern inception of the rule in 1966).

¹⁰ Allen, *supra* note 6; See Robert Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L. J. 1251, 1260 [hereinafter Bone, *Class*] (noting that one of the many goals the drafters had in mind when reformulating Rule 23 was judicial efficiency, but that this goal concerned many people in the business, securities and environmental fields who believed that they would become targets for enormous amounts of litigation).

¹¹ Allen, *supra* note 6.

ments.¹²

In 1982, the United States Supreme Court heard *General Telephone Company of Southwest v. Falcon*, which was instrumental in the development of class action lawsuits. This case set forth the standard of “rigorous analysis” that lower courts must employ in order to properly certify classes under Rule 23.¹³ This standard of a “rigorous analysis” led the Court to become even more selective and skeptical when certifying large diverse classes.¹⁴ From the 1980s through 1995, despite the courts use of the “rigorous analysis” standard, class certifications were easier to come by for plaintiffs.¹⁵ Even more importantly—in the context of *Comcast*—was the deference given to expert testimony.¹⁶ The certification of the class at the district court level had great importance because until 1998, a class certification was unchangeable, as there was no vehicle for a party to appeal.¹⁷ However, courts began to shift in their perception of class actions in 1995, when appellate courts started decertifying classes.¹⁸ Two years later, the Supreme Court began issuing opinions that would decertify major class actions suits.¹⁹ Courts, including the Supreme Court, have since taken the rule set forth in *Falcon* as a strict requirement.²⁰ Additionally, due to the Class Action Fairness Act of 2005, these types of cases increasingly reached the Supreme Court and thus the process for analyzing class certification became more defined.²¹

¹² *Id.*; See also Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 737 (2013) [hereinafter Klonoff, *Decline*] (explaining that very few class actions actually went to trial, but instead involved high monetary settlements).

¹³ *Falcon*, 457 U.S. at 147.

¹⁴ Allen, *supra* note 6.

¹⁵ *Id.*; See Klonoff, *Decline supra* note 12, at 737 (suggesting that in the 1980s class actions were easier to come by for plaintiffs).

¹⁶ Allen, *supra* note 6; *But cf.* 1 MCLAUGHLIN ON CLASS ACTIONS § 3:14 n. 18 (9th ed.) (quoting *In re Potash Antitrust Litigation*, 159 F.R.D. 682, 687 (D. Minn. 1995)) (holding that “[i]n assessing whether to certify a class, the Court’s inquiry is limited to whether or not the proposed methods are so insubstantial as to amount to no method at all”).

¹⁷ See FED. R. CIV. P. 23(f).

¹⁸ Allen, *supra* note 6.

¹⁹ *Id.*

²⁰ *Id.*

²¹ See generally Class Action Fairness Act, 28 U.S.C. §1453 (2011) (providing avenues for class action disputes so that they may be removed from state court to federal district courts); See John Campbell, *Unprotected Class: Five Decisions, Five Justices, and Wholesale Change to Class Action Law*, 13 WYO.

The Court no longer examined Rule 23 as a pleading standard, and although courts previously did not delve into the merits of the case, it soon became a necessary step in determining whether certification was proper.²² More importantly, recently and in large part due to the influential case of *Wal-Mart v. Dukes*, the requirement for commonality became more structured.²³ As often mentioned in dissenting opinions, plaintiff potential classes have historically satisfied the requirements of Rule 23(a) quite easily.²⁴ Rule 23(a) required that plaintiffs only had to possess one common question or one common point of unification in order to meet this requirement.²⁵ However, the shift from common questions to common answers, which became a large point of contention for the Court in addressing *Comcast*, had begun.

I. BACKGROUND

Rule 23 of the Federal Rules of Civil Procedure sets forth the requirements for a class action suit.²⁶ Plaintiffs must satisfy the requirements of Rule 23(a) as well as satisfy at least one subsection of Rule 23(b). Typically, fulfilling the prerequisites of Rule

L. REV. 463, 466–67 (noting four important consequences of CAFA, (1) broadened the scope of federal diversity jurisdiction to include more class action disputes, (2) authorized the removal from state courts, (3) altered the procedure for class actions, and (4) created regulation for settlement and minimized disparate treatments for diverse class members).

²² Allen, *supra* note 6; See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551–52 (2011) (explaining that it is necessary to examine merits in order to make a proper determination on preliminary matters, including class certification).

²³ Allen, *supra* note 6; See *Wal-Mart*, 131 S. Ct. at 2555 (stating that “[m]erely showing that Wal-Mart’s policy of discretion has produced an overall sex-based disparity does not suffice” to meet the requirement of commonality); See also Bone, *Misguided supra* note 9 (stating, “[t]he Wal-Mart Court made (a)(2) into something stricter. After Wal-Mart, a common question alone is not enough; the common question must lie at the core of all the claims.”).

²⁴ *Wal-Mart*, 131 S. Ct. at 2565 (Ginsburg, J., dissenting) ((citing Moore’s Federal Practice § 23.23[2] (3d Ed. 2011)); See also *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 472 (1986) (noting that under Rule 23(a), “[t]he threshold of ‘commonality’ is not high.”).

²⁵ Allen, *supra* note 6; but cf. A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 471 (2013) (stating that recently, what matters at the class certification stage is not common questions, but rather common answers).

²⁶ FED. R. CIV. P. 23.

23(a) is a simpler standard for plaintiffs to meet.²⁷ Prior to 2011, virtually every potential class met the requirements of Rule 23(a).²⁸ Because the parties in *Comcast* did not dispute whether Rule 23(a) was satisfied, the courts' analysis consisted of a discussion of Rule 23(b). Historically, 23(b) imposes a slightly stricter burden for the plaintiffs to meet in order for proper class certification.²⁹ This subsection denotes the types of class actions that may be maintained provided that subsection (a) has been satisfied.³⁰ Rule 23(b)(1) states that a class may be certified if dividing the class into individuals or smaller sub-classes would create a risk of either (1) inconsistent rulings for each of the members or (2) as a practical matter adjudicating individual matters would be dispositive to the other members' interests or prevent the other members from properly protecting their interests.³¹ Similarly, Rule 23(b)(2) holds that the class may be certified if the defendant acts or fails to act on grounds applicable to the whole class, where final injunctive or declaratory relief is necessary for the all class members.³² The most relevant subsection for this Note, however, is Rule 23(b)(3) because it was the point of controversy for the Court in *Comcast*.³³ Rule 23(b)(3) is often referred to as the predominance requirement since it requires that questions of law or fact relevant to the class predominate over questions that are common to individual members.³⁴

²⁷ See *Amchem Products, Inc. v. Windsor*, 521 U.S.591, 624 (holding "[e]ven if Rule 23(a)'s commonality requirement may be satisfied by that shared experience, the predominance criterion is far more demanding.").

²⁸ Robert Klonoff, *Reflections on the Future of Class Actions*, 44 LOY. U. CHI. L.J. 533, 536 (2012) [hereinafter Klonoff, *Reflections*].

²⁹ Bone, *Misguided supra* note 9, at 55; See also Rule 23. Class Actions, 1 Federal Rules of Civil Procedure, Rules and Commentary Rule 23 (noting that commonality historically was often easily met, and that Rule 23(b) acted more like a gatekeeper to keep unnecessary suits from progressing forward).

³⁰ 1 NEWBERG ON CLASS ACTIONS § 3:27 (5th ed.) (explaining that all requirements set forth in 23(a) must be satisfied, as well as one of the four subsections of 23(b)). As the author addresses it is important to note, while 23(b) has three subsections 23(b)(1) has two distinct parts. *Id.* at n. 1.

³¹ FED. R. CIV. P. 23(b)(1).

³² FED. R. CIV. P. 23(b)(2).

³³ *Comcast*, 133 S. Ct at 1433–35.

³⁴ FED. R. CIV. P. 23(b)(3) which states that,

A class action may be maintained if Rule 23(a) is satisfied and if . . . the court finds that 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. The matters pertinent to these findings include: (A) the class

The main issue in *Comcast* was an allegation of a breach of the Sherman Act, which was designed to protect trade and commerce, and make trusts that would restrict trade or commerce in any way illegal.³⁵ Often in an antitrust class action case, before the merits of the claim can be explored the question of certification must be settled.³⁶ Rule 23(b)(3) dictates that a class action must be the most effective method of litigation in adjudicating the dispute.³⁷ However, if the defendant(s) are successful, the likelihood that individual class members will pursue smaller or individual actions against the company or corporation in an antitrust suit is minimal.³⁸

Historically, there was a liberal approach with respect to certifying antitrust class actions, in large part because class actions were the best way to treat these types of disputes.³⁹ However, the treatment of expert testimony in antitrust class actions has differed, with some courts applying a minimal level of scrutiny to expert testimony prior to certification.⁴⁰ This sentiment of mini-

members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and the likely difficulties in managing class action.

³⁵ See Sherman Act, 15 U.S.C. § 1 (2012) (stating “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”).

³⁶ Rabiej, *supra* note 8, at 328.

³⁷ Bone, *supra* note 9, at 1260 (suggesting that the 1966 drafters of Rule 23 intended subsection (b)(3) to “further the twin policies of efficiency and substantive norm enforcement.”).

³⁸ See *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) (acknowledging that “[t]he realistic alternative to a class action is not seventeen million individual suits, but zero individual suits” and this is because of the likely cost to individual plaintiffs to litigate against large corporate defendants).

³⁹ See *In re Am. Exp. Merchants’ Litig.*, 667 F.3d 204, 219 (2d Cir. 2012) *cert. granted*, 133 S. Ct. 594 (U.S. 2012) and *rev’d sub nom. Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (U.S. 2013) (holding that the court is “persuaded by the record before us that if plaintiffs cannot pursue their allegations of antitrust law violations as a class, it is financially impossible for the plaintiffs to seek to vindicate their federal statutory rights.”).

⁴⁰ Robert H. Klonoff, *Antitrust Class Actions: Chaos in the Courts*, 11 *Stan. J. L. Bus. & Fin.* 1, 14 (2005) [Hereinafter Klonoff, *Antitrust*] (citing to *In re Cardizem CD Antitrust Litigation* 200 F.R.D 326, 348 (E.D. Mich. 2001)); See also *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1042 (N.D. Miss. 1993) (holding that “[t]he court’s role at the class certification stage in as-

mal scrutiny, however, was not applied by all courts or in all cases; additional scrutiny placed on expert witnesses is apparent in *Weisfeld v. Sun Chemical Corp.*, where the court addressed the fact that the expert did not provide support for his conclusions.⁴¹ As a result, the court expressed concerns that there would not be adequate proof to demonstrate that the injury and damages were on a class-wide basis.⁴²

The idea of “rigorous scrutiny” evolved from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁴³ While the case did not coin this term, there was an instructive discussion on the scrutiny that must be completed with respect to expert testimony.⁴⁴ Historically, circuit courts were divided on whether or not and to what extent *Daubert* applies to class actions.⁴⁵ There was some speculation that *Comcast v. Behrend* would clarify any confusion, however this was not the case.

II. DISCUSSION - *COMCAST V. BEHREND*

Comcast Corp v. Behrend, which alleged violations of sections 1 and 2 of the Sherman Antitrust Act, first went to trial in the United States District Court for the Eastern District of Pennsylvania.⁴⁶ Following the decision in *In re Hydrogen Peroxide Antitrust Litigation*—which held that simply because the certification requirements and the merits of a claim overlap that does not excuse a thorough inquiry into ensuring the prerequisites are

sessing the proposed methods of proving damages is quite limited. The preliminary inquiry is whether or not the proposed methods are so insubstantial that they amount to no method at all.”); *but see In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (noting however, that the district court must determine that the expert testimony is not so unreliable that it would be inadmissible as a matter of law).

⁴¹ *Weisfeld v. Sun Chem. Corp.*, 84 F. App’x 257, 261–62 (3d Cir. 2004).

⁴² *Weisfeld v. Sun Chem. Corp.*, 210 F.R.D. 136, 144 (D.N.J. 2002).

⁴³ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 133 S. Ct. 2786 (1993).

⁴⁴ *Daubert*, 133 S. Ct. at 2792. This case established the standard for expert testimony, specifically stating that at the trial level the judge must determine “that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.” *Id.*

⁴⁵ Meredith M. Price, *The Proper Application of Daubert to Expert Testimony in Class Certification*, 16 LEWIS & CLARK L. REV. 1349, 1356 (2012) (stating, “the debate between the Seventh and Eighth Circuits centers on whether the Supreme Court’s decision in *Daubert* . . . is applicable at the point of class certification or instead limited to a full application during the merit portion of a trial.”).

⁴⁶ *Behrend v. Comcast Corp.*, 264 F.R.D. 150, 153 (E.D. Pa. 2010).

met—the court granted Comcast’s motion to reconsider whether certification of the class of plaintiffs was proper.⁴⁷ The plaintiffs put forth four theories of antitrust behavior and while the court affirmed the certification of the class, it only accepted one of the theories.⁴⁸ The court held the theory that Comcast exhibited overbuilding behavior, which deterred other competitors from entering the market, was sufficient to support class certification.⁴⁹

In *Comcast*, the potential class sought certification under Rule 23(b)(3), which states that certification is proper if the questions of law or fact common to the class predominate over any issues relating to the individual members of the class.⁵⁰ Rule 23(b)(3) goes on to require that litigating as a class action must be the best and most effective way to adjudicate the controversy at hand.⁵¹

The trial court is tasked with performing a “rigorous analysis” of potential class actions when determining if certification is proper.⁵² The *Hydrogen Peroxide* ruling clarified the definition of “rigorous analysis” because it specifically requires trial courts to complete a deep analysis of all factual and legal issues that are relevant to Rule 23.⁵³ The court need not delve into the full merits

⁴⁷ *Id.*

⁴⁸ *Id.* The four theories included: (1) Comcast’s swaps and transactions in the Philadelphia market eliminated competition and as a result, customers experienced increased prices; (2) the fact that Comcast clustered the Philadelphia market led to higher rates for basic cable; (3) it was profitable for Comcast to deny access to regional sports channels which in turn increased the prices of basic cable subscribers; and (4) Comcast’s clustering prevented over builders from entered the Philadelphia market, which resulted in higher rates paid by class members; *See also* Mark Moller, Common Problems for the Common Answer Test: Class Certification in *Amgen and Comcast*, (October 24, 2013) 2013 Cato Supreme Court Review 301, available at <http://ssrn.com/abstract=2344877> (explaining “‘clustering’ is antitrust lingo for a company’s efforts to concentrate its operations in a particular market, and Comcast pursued such a strategy in the Philadelphia are through a series of acquisitions approved by antitrust regulators.”).

⁴⁹ *See Behrend*, 264 F.R.D. at 153.

⁵⁰ *Id.* at 154.

⁵¹ *Behrend*, 264 F.R.D. at 154; FED. R. CIV. P. 23(b).

⁵² *Behrend*, 264 F.R.D. at 154; *See* 5 James Wm. Moore et al., Moore’s Federal Practice § 23.61 [1] (3d ed. 2008) (stating “[p]leading requirements are distinct from the requirements for certifying a case as a class action. A court may not and should not certify a class action without a rigorous examination of the facts to determine if the certification requirements of Rule 23(a) and (b) have been met.”).

⁵³ *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 309 (3d. Cir. 2008).

of the case at the certification stage, but may need to hear expert testimony with respect to the prerequisites of Rule 23.⁵⁴ The district court, under Rule 23(b), has the burden of considering whether the plaintiff's legal claim may be proven with evidence at trial that is related to all the class members.⁵⁵ In order to succeed on an antitrust allegation, the plaintiffs must prove three essential elements: (1) a violation of section one of the Sherman Antitrust Act; (2) individual injury or impact resulting from the violation; and (3) measurable damages.⁵⁶ Moreover, the plaintiffs must prove that evidence common to the class will predominate for each of the elements.⁵⁷ At the certification stage, the plaintiffs need not prove the merits or the effects of antitrust behavior but must show that each element of an antitrust claim may be proven at trial by evidence that is common to the class.⁵⁸

The plaintiffs believed they could offer evidence through their damage expert, Dr. McClave, and his model, which described the extent of damages Comcast owed to the class.⁵⁹ Dr. McClave approximated these figures under the assumption that

⁵⁴ *Behrend*, 264 F.R.D. at 155; *See also* 5 Moore's Federal Practice § 23.46[4] (stating "because the determination of a certification request invariably involves some examination of factual and legal issues underlying the plaintiffs' cause of action, a court may consider the substantive elements of the plaintiffs' case in order to envision the form that a trial on those issues would take.").

⁵⁵ *Id.*

⁵⁶ *Id.* at 156 (quoting *In re Hydrogen Peroxide*, 552 F.3d. at 311).

⁵⁷ *Id.* (quoting *Weisfeld v. Sun Chem. Corp.*, 210 F.R.D. 136, 141 (D.N.J. 2002)); *See Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 454 (3d Cir. 1977) (explaining that every single class member must prove at least some degree of impact from the alleged antitrust violation).

⁵⁸ *Behrend*, 264 F.R.D. at 156; *See In re New Motor Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008) (holding "[i]n antitrust class actions, common issues do not predominate if the fact of antitrust violation and the fact of antitrust impact cannot be established through common proof.").

⁵⁹ *Behrend*, 264 F.R.D. at 156; *See also In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82, 95 (D. Conn. 2009) (discussing the use of a regression model to provide evidence of predominance, specifically noting that "[i]n an antitrust suit, plaintiffs will generally use multiple regression analysis to demonstrate that a 'conspiracy' variable has influence over the dependent variable (price)-that is, class members paid a higher price than the basic economic principles of supply and demand would otherwise dictate, thus demonstrating collusive behavior was at work."); *See also Behrend*, 264 F.R.D. at 169 n. 24 (explaining that "it is undisputed by the experts that multiple regression analysis is an acceptable and widely recognized statistical tool for measuring antitrust impact.").

all four theories of liability would prevail.⁶⁰ The court held that the class could demonstrate a common damage methodology, so it did not matter that the damage model reflected all four theories of antitrust behavior rather than solely the accepted over builder theory, and thus the class was certified.⁶¹

After the unfavorable decision, Comcast appealed to the United States Court of Appeals for the Third District.⁶² The court of appeals ruled that an attack on the methodology is irrelevant in an inquiry of class certification.⁶³ At this stage, the court stated that the plaintiffs need not tie each theory with a precise number of damages but merely must show that damages could be accurately calculated.⁶⁴ The court held that the district court examined the evidence submitted on both sides, which included methodology, conclusions, and present criticisms.⁶⁵ The court determined that the model was still workable despite the use of all four theories of antitrust conduct in its calculations.⁶⁶ The court emphasized that at the class certification stage the district court simply must determine whether plaintiffs have demonstrated through a preponderance of evidence that damages may be assessed through common proof.⁶⁷ Class certification will not be defeated simply because the calculations may not be exact.⁶⁸

While the court affirmed the lower court's decision, Judge Jordan put forth a strong dissent.⁶⁹ The Judge adamantly argued that the district court used too much discretion in determining

⁶⁰ *Behrend*, 264 F.R.D. at 162.

⁶¹ *Id.* at 191.

⁶² *Behrend v. Comcast Corp.*, 655 F.3d 182 (3d Cir. 2011) *cert. granted in part*, 133 S. Ct. 24, 183 L. Ed. 2d 673 (U.S. 2012) and *rev'd*, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (U.S. 2013).

⁶³ *Behrend*, 655 F. 3d at 207.

⁶⁴ *Id.*; *See* 1 McLaughlin on Class Actions § 3:14 (9th ed.) (explaining that the court emphasized that the district court should determine whether the expert's model can evolve into admissible evidence, not necessarily whether the evidence offered is perfect at the certification stage).

⁶⁵ *Behrend*, 655 F. 3d at 200.

⁶⁶ *Id.*; *See* Campbell, *supra* note 21, at 476 (describing that the court found that the expert did not have to perform all the different potential calculations, but rather it was sufficient that there simply was a method and a formula that could be used to calculate should the case proceed to trial).

⁶⁷ *Behrend*, 655 F.3d at 204.

⁶⁸ *Id.* (quoting *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 26 (1st Cir. 2008) ("We are looking here not for hard factual proof, but for a more thorough explanation of *how* the pivotal evidence behind plaintiff's theory can be established.")).

⁶⁹ *Behrend*, 655 F.3d at 208 (Jordan, J., dissenting).

that certification of the class was proper, holding that the model failed to demonstrate that common evidence was available to estimate damages applicable to the entire class.⁷⁰ He suggested remanding the case in order to determine whether the class needed to be divided into subclasses to make damages more ascertainable.⁷¹

He further emphasized that the model was irrelevant because it did not solely examine the accepted theory of anticompetitive overbuilding.⁷² In order to remedy this discrepancy, Judge Jordan argued that the court should vacate and require the plaintiffs to adjust the model to reflect only the overbuilding theory, which later became an issue for the majority once the case reached the Supreme Court.⁷³ Judge Jordan emphasized that the overbuilding theory would only impact the counties in which RCN was licensed to overbuild, which in fact were only five of the nineteen counties.⁷⁴ This further demonstrated, in Judge Jordan's mind, that certification of the entire class was improper.⁷⁵

A. The Supreme Court's Majority Opinion

In the majority's discussion, Judge Jordan's dissent played an important role once Comcast brought its case before the Supreme Court of the United States.⁷⁶ The Court attempted to answer one important question: whether class certification is proper if the evidence provided is not clearly admissible.⁷⁷ The court

⁷⁰ *Id.* at 210 (Jordan, J., dissenting); *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311–12 (3d Cir. 2008) (noting the question of predominance revolves around whether the plaintiffs can prove that antitrust impact is capable at proof at trial which is common to the class, as opposed to the individual). Judge Jordan asserts that the majority abused its discretion in finding that this is possible. *See also Messner v. Northshore University HealthSystem*, 669 F.3d 802, 823 (7th Cir. 2012) (stating that it would be an “appropriate and limited use of merits evidence at the certification stage” for defendants “to argue that [an expert's] methodologies were flawed.”).

⁷¹ *Behrend*, 655 F.3d at 211 (Jordan J., dissenting).

⁷² *Id.* at 225 (Jordan, J., dissenting); *Comcast*, 133 S. Ct. at 1432–35.

⁷³ *Behrend*, 655 F. 3d at 216 (Jordan, J., dissenting). Judge Jordan held that the model did not meet the one of the three requirements imposed by Rule 702 and *Daubert*, specifically arguing that the testimony and facts were not adequately tied together.

⁷⁴ *Id.* at 213.

⁷⁵ *Id.* at 225 (Jordan J. dissenting).

⁷⁶ *Comcast*, 133 S. Ct. at 1434 (citing *Behrend*, 655 F. 3d at 216).

⁷⁷ *Comcast*, 133 S. Ct. 1426. The court stated that the issue is “whether a district court may certify a class action without resolving whether the plaintiff

voted in favor for Comcast, in a 5-4 decision, with Justice Scalia writing the majority opinion.⁷⁸

The Court emphasized that because the model focused on the plaintiffs' original argument, which included all four theories of antitrust behaviors exhibited by Comcast, and failed to acknowledge the solely accepted theory, class certification was improper.⁷⁹ While the court of appeals affirmed the district court's holding, the Supreme Court disagreed, given that the model's methodology could be used to show that the damages were capable of measurement.⁸⁰ The majority held that the court of appeals disregarded precedent that dictates a thorough analysis of whether common issues predominate over individual issues.⁸¹ Because the lower courts saw no purpose in tying the accepted theory of antitrust behavior to the damage model, they did not meet the required standard.⁸² Moreover, without matching theories of liability to damage calculation, the court of appeals set the bar for appropriate methodology quite low.⁸³

Thus, the majority found the plaintiff's evidence model lacking, and held the evidence was insufficient to show predominance of issues.⁸⁴ The Court emphasized that because the model focused on the plaintiffs' original argument, which included all four theories of antitrust behaviors exhibited by Comcast, and failed to acknowledge the one accepted theory, class certification was improper.⁸⁵

The Court relied, at least in part, on a *Daubert* analysis.⁸⁶

class has introduced admissible evidence, including expert testimony, to show the case is susceptible to awarding damages on a class-wide basis." *Id.*

⁷⁸ *Id.* at 1432–35.

⁷⁹ *Comcast*, 133 S. Ct. at 1433; See Federal Judicial Center, Reference Manual on Scientific Evidence 432 (3d ed. 2011) (stating that "[t]he first step in a damages study is the translation of the legal theory of the harmful event into an analysis of the economic impact of that event.").

⁸⁰ *Comcast*. 133 S. Ct. at 1431.

⁸¹ *Id.* at 1433 (stating that "by refusing to entertain certain arguments against respondents damages model . . . simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of precedents requiring precisely that inquiry.").

⁸² *Id.*

⁸³ See *Comcast*, 133 S. Ct. at 1433 (stating "under that logic [by refusing to delve in the merits of the case], 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.").

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Sergio Campos, *Opinion Analysis: No Common Ground*, SCOTUS

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The majority only mentioned this briefly because Comcast did not challenge the admissibility of the plaintiffs' expert testimony in district court.⁸⁷ Because it was not fully addressed by the Court, it is unclear specifically to what extent a *Daubert* analysis is necessary at the class certification stage.⁸⁸

At the heart of this case is the debate over whether a class must simply have "common questions" or must also have "common answers."⁸⁹ The Court found that there has to be a common answer to the issue of damages in a class action suit, and because the plaintiffs failed to provide this, the class cannot and should not have been certified by the lower courts.⁹⁰ The Court held that the questions relating to individual damage calculations will outweigh the questions relevant to the class.⁹¹ Thus, the majority held that in order for a class to be certified there must not only be common questions, but there must also be common answers.

B. *The Supreme Court's Minority Opinion*

The majority opinion prompted a strong dissent by Justices Ginsberg, Breyer, Sotomayor and Kagan who disagreed on both procedural and substantive grounds.⁹² First and foremost, the dissent stated that given the reformulation of the original

BLOG (March 29, 2013) available at: <http://www.scotusblog.com/2013/03/opinion-analysis-no-common-ground/>; See generally *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (establishing how expert testimony must be examined by the court).

⁸⁷ *Id.*

⁸⁸ *Id.*; See Brief for the Chamber of Commerce of the United States of America, Business Roundtable, and the Securities Industry and Financial Markets Association as Amici Curiae Supporting Petitioners at 5, *Comcast*, 133 S. Ct. 1426 (noting that if a trial court certifies based on expert testimony that would not withstand a *Daubert* analysis then the court skirts its gatekeeping responsibility and allows certification that does not meet the prerequisites set forth in Rule 23).

⁸⁹ Allan Dinkoff, *Comcast v. Behrend' Bigger Than We Thought at First Blush?* N.Y.L.J., April 5, 2013, available at <http://www.weil.com/news/pubdetail.aspx?pub=11819>; See also Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131–32 (2009) (suggesting that "[w]hat matters to class certification. . . is not the raising of common questions . . . but, rather the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of litigation.").

⁹⁰ *Comcast*, 133 S. Ct. at 1433–35.

⁹¹ *Id.* at 1430; FED. R. CIV. P. 23(b)(3).

⁹² *Comcast*, 133 S. Ct. at 1435 (Ginsburg J., & Breyer J., dissenting).

question, the petition for certiorari should not have been granted. Instead of hearing and discussing the District Court's Rule 23(b)(3) analysis and determining error as originally anticipated, the question shifted into a debate on the admissibility of expert testimony.⁹³ Therefore, the parties prepared to argue their point under the Federal Rules of Evidence 702 and a *Daubert* analysis.⁹⁴ However, as the dissent pointed out, Comcast must have objected to the expert evidence in a timely matter in order for the claim to be preserved.⁹⁵ Because Comcast made no objection, it forfeited its right to object to the model at the class certification stage.⁹⁶ Thus, the dissent argued that because Comcast forfeited its right, the writ of certiorari was carelessly granted.⁹⁷

Additionally, the dissent addressed the issue of judicial efficiency.⁹⁸ They emphasized that when aggregating the plaintiffs and determining liability common to the class, predominance is often satisfied, in large part, because it saves time and expense.⁹⁹ Further, the dissent cited *Butler v. Sears Roebuck & Company*, which held that certification is proper for classes because of efficiency and specifically that predominance is an issue of efficiency.¹⁰⁰ That case established that no bar exists on class certification

⁹³ *Id.*; See also Campos, *supra* note 86 (noting "[t]he Court granted certiorari, but reformulated the question presented as one concerning whether the expert's model had to be admissible under *Daubert* for class certification purposes. Consequently, the justices during oral argument focused on what standard of admissibility, if any, should apply to evidence like the expert's model offered to show a predominance of common issues.").

⁹⁴ *Comcast* 131 S. Ct. at 1435.

⁹⁵ *Id.*; See also FED. R. EVID. 103 (setting forth the requirements for claiming an error in evidence in order to exclude evidence).

⁹⁶ *Comcast*, 133 S. Ct. at 1436 (Ginsburg, J. & Breyer, J., dissenting); *but see* Brief for Petitioners at 4, *Comcast*, 133 S. Ct. 1426 (stating that Comcast did preserve its objection by objecting to the use of the model at class certification, and did not also need to separately object to the admission of the expert's opinions at the evidentiary hearing).

⁹⁷ *Comcast*, 133 S. Ct. at 1436 (Ginsburg, J. & Breyer, J., dissenting).

⁹⁸ *Id.* at 1437 (Ginsburg J. & Breyer, J., dissenting) (citing to 7AAC. Wright A. Miller, & M. Kane, Federal Practice and Procedure § 1778, 121 (3d ed. 2005)); See *Jenkins*, 782 F.2d at 471 (explaining that the class action device is necessary for permitting issues affecting many parties to be litigated in a managed, expedited and efficient way).

⁹⁹ Wright A. Miller, & M. Kane, Federal Practice and Procedure § 1778 121(3d ed. 2005).

¹⁰⁰ *Comcast*, 133 S. Ct. at 1437; See *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 662 (7th Cir. 2012) cert. granted, judgment vacated, 133 S. Ct. 2768, 186 L. Ed. 2d 215 (U.S. 2013) and judgment reinstated, 11-8029, 2013 WL 4478200 (7th Cir. Aug. 22, 2013) (stating "predominance is a question of effi-

simply because every plaintiff did not suffer from the exact same issues.¹⁰¹

The dissent emphasized that the main issue is an antitrust injury, specifically that the injury must be the type that existing antitrust laws were designed to prevent.¹⁰² The respondents attempted to prove a violation by noting that Comcast had taken control of over 60% of the Philadelphia market.¹⁰³ This was important for the dissenting opinion, as it noted that the government typically finds any one firm or company owning over 25% of the market problematic.¹⁰⁴ It was the responsibility of the class to prove that not only did Comcast have monopoly power, but also that it used that power to charge the plaintiffs higher prices.¹⁰⁵

The class attempted to demonstrate that Comcast asserted its monopoly power through the regression analysis offered by their expert, Dr. McClave.¹⁰⁶ The regression analysis in the model compares the counties included in the class to the counties outside the class, where the alleged anticompetitive conduct was not practiced.¹⁰⁷ The model concluded that because of Comcast's al-

ciency . . . Is it more efficient, in terms both of economy of judicial resources and of the expense of litigation to the parties, to decide some issues on a class basis or all issues in separate trials?").

¹⁰¹ *Comcast*, 133 S. Ct. at 1438 (Ginsburg J. & Breyer, J., dissenting).

¹⁰² *Id.*; *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334(1990) (quoting *Brunswick Corp v. Pueblo Bowl-O-Mat.*, 429 U.S. 477, 489 (1977) (noting that a plaintiff cannot recover under the Clayton Act simply because there may exist a casual link between injury and an illegal presence on the market, but rather that the injury has to flow from an illegal activity that existing antitrust laws aim to prevent).

¹⁰³ *Comcast*, 133 S. Ct. at 1438 (Ginsburg J. & Breyer, J., dissenting).

¹⁰⁴ *Id.* (citing to Dept. of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* § 5.3, 19 (2010)) (explaining how firms that own that large of a portion of the market gain the ability to charge or raise prices above the typical competitive levels, thus harming consumers).

¹⁰⁵ *Id.*; *See, e.g., Ethylene Propylene*, 256 F.R.D. at 88 (offering an explanation of how regression models may be used to prove predominance sufficient to satisfy Rule 23(b)(3)).

¹⁰⁶ *Comcast*, 133 S. Ct. at 1439 (Ginsburg J. & Breyer, J., dissenting); Third Amended Class Action Complaint of the Sherman Antitrust Act at 2 *Behrend v. Comcast* 264 F.R.D. 150 (2010) (arguing that because Comcast clusters the market it possess the requisite monopoly power over the region and can charge supracompetitive prices because of the limited availability of other cable companies available to customers in the region).

¹⁰⁷ *Comcast*, 133 S. Ct. at 1439 (Ginsburg J. & Breyer, J., dissenting). Dr. McClave used a "but-for" model suggesting what prices would have looked like "but-for" Comcast's alleged antitrust actions. *See Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 485 (3d Cir. 1998) (stating "using a 'but for' damage

leged behavior, consumers in the affected market were paying over 13% more for their subscription services.¹⁰⁸ While the model was the point of contention for Comcast and basis for the majority's decision, the dissent adamantly argued that it was sufficient.¹⁰⁹

The minority examined the issue of admissibility with regards to the contested damage model offered by the plaintiffs.¹¹⁰ The purpose of the model was to demonstrate that Comcast's antitrust behaviors led Comcast subscribers to pay higher prices than if there had been competitors in the Philadelphia region.¹¹¹ The model was not used to determine damages, but rather to prove liability.¹¹² Therefore, the dissent did not believe that the district court abused its discretion in finding that the model could, in theory, determine damages suffered by the class even though the model included all theories of liability, not just the successful theory.¹¹³ The dissenting justices stated that it could be used to measure damages for the accepted overbuilder theory, in large part, because Comcast argued that the other theories, which were not accepted by the lower courts, did not impact prices.¹¹⁴ Justices Ginsburg and Breyer further argued that, if Comcast's contention was correct, then the model could accurately depict the difference in price due to the overbuilding theory.¹¹⁵ In essence, the dissent believed the model served enough of a purpose

model arguably makes it impossible for the trier of fact to determine what, if any, injury derived from the defendant's antitrust violations as opposed to other factors and courts sometimes reject such models as the basis of either causation or amount of injury.”)

¹⁰⁸ *Comcast*, 133 S. Ct. at 1439 (Ginsburg J. & Breyer, J., dissenting).

¹⁰⁹ *Id.*; *See United States v. Virginia*, 518 U.S. 515, 589 n. 5 (1996) (Scalia J., dissenting) (emphasizing the typical rule is that the Supreme Court will not review findings of fact by the lower courts when they agree except in extraordinary circumstances where there is clearly an error).

¹¹⁰ *Comcast*, 133 S. Ct. at 1439 (Ginsburg J. & Breyer, J., dissenting); *See Daniel L. Rubinfeld, Reference Guide on Multiple Regression*, 181, 186–88 (Federal Judicial Center, 2d ed.2000) (noting that expert's choices are crucial when creating the regression model, the model must be correctly established, including properly choosing the variables, in order for results to be valid).

¹¹¹ *Comcast*, 133 S. Ct. at 1439 (Ginsburg J. & Breyer, J., dissenting).

¹¹² *Id.* at 1441. The dissent adamantly argued “Dr. McClave's model does not purport to show *how* Comcast's conduct led to higher prices in the Philadelphia area. It simply shows *that* Comcast's conduct brought about higher prices. And it measures the amount of subsequent harm.”

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

to affirm the lower courts certification of the class.¹¹⁶

IV. ANALYSIS OF - *COMCAST V. BEHREND*

A. Majority's Analysis

Justice Scalia in the majority opinion stated that *Comcast* is “a straightforward application of certification principles.”¹¹⁷ The majority appears to have made the stronger argument especially under the understanding that class action suits are without a doubt evolving in the legal arena.¹¹⁸ As Part I suggests, class actions have developed since Rule 23 was first established in 1966.¹¹⁹ The majority had the opportunity to answer the question of whether *Daubert* needed to be applied in the “rigorous analysis” standard employed by the lower courts prior to class certification.¹²⁰ As the minority addressed, the lack of a *Daubert* discussion by the majority in *Comcast* was likely the consequence of Comcast never raising an issue about Dr. McClave’s model early on and therefore waiving its right to object.¹²¹

While the Court may have missed an opportunity to provide clarity about the scope or application of a *Daubert* analysis in class action suits, it reemphasized important procedural aspects of class actions.¹²² The Court emphasized that a determina-

¹¹⁶ *Id.*

¹¹⁷ *Comcast*, 133 S. Ct. at 1433; *See also* Bone, *Misguided supra* note 9 at 44 (noting that “[t]he Court purported to simply apply the ‘rigorous analysis’ standard of proof for certification that *Wal-Mart* endorsed, which includes a serious merits review.”).

¹¹⁸ Allen, *supra* note 6; *See* Linda S. Mullenix, *Putting Proponents to Their Proof: Evidentiary Rules at Class Certification*, 6 (The University of Texas School of Law Pub. Law & Legal Theory Research Paper Series, No. 416 2013), available at <http://ssrn.com/abstract=2276088> [hereinafter Mullenix, *Proponents*] (acknowledging the evolution of class actions, specifically in the last two decades where there the “rigorous standard” analysis is increasingly being applied by all levels of the federal courts).

¹¹⁹ Allen, *supra* note 6.

¹²⁰ Mullenix, *Proponents supra* note 118, at 12.

¹²¹ *Comcast*, 133 S. Ct. at 1436 (Ginsburg, J. & Breyer, J. dissenting).

¹²² Mullenix, *Proponents supra* note 118 at 12; *See Comcast*, 133 S. Ct. at 1432 (explaining that Rule 23 is not merely a pleading standard, but rather the plaintiffs must not only satisfy the four requirements of Rule 23(a), but also clearly satisfy, through evidentiary proof, a subsection of Rule 23(b)). *Comcast* took the majority opinion in *Wal-Mart* a step further and extended its analysis regarding 23(a) to 23(b). Therefore, an even closer look is now required to determine if plaintiffs adequately satisfy 23(b).

tion of class certification must involve an analysis that delves deep into the requirements set forth in Rule 23.¹²³ This further reiterates the movement away from an *Eisen v. Carlisle & Jacquelin* standard where class certification did not involve any analysis into the merits of the case.¹²⁴ The recent trend has been towards applying a *Daubert* analysis, even without explicitly referring to it as that, when analyzing and evaluating the weight of expert testimony.¹²⁵ This is because if expert testimony were simply accepted on its face, virtually all classes would be certified.¹²⁶

In 2003, the Advisory Committee on Civil Rules removed the provision permitting conditional class certification, which suggests an even greater importance placed on conducting a deep analysis prior to class certification.¹²⁷ While judges still have the discretion to reassess certification at a later stage, often times this is no longer practiced.¹²⁸ This further emphasizes that when a class is certified it should not be a light or conditional decision.¹²⁹

¹²³ Mullenix, *Proponents supra* note 118 at 12; *See Falcon*, 457 U.S. at 147 (emphasizing that it is sometimes necessary to delve beyond the pleadings in order to determine if the Rule 23 prerequisites to certification are satisfied, and certification is proper only in the event that a district court completes a rigorous analysis prior to certification).

¹²⁴ Mullenix, *Proponents supra* note 118, at 12; *See also Eisen*, 417 U.S. at 177 (holding that that “nothing in either the language or history of Rule 23 . . . 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”).

¹²⁵ Mullenix, *Proponents supra* note 118, at 24; *See Wal-Mart*, 131 S. Ct. at 2553–54 (noting that the Court disagreed with the district court’s finding that *Daubert* did not apply to expert testimony prior to certification).

¹²⁶ Mullenix, *Proponents supra* note 118, at 24; *See Comcast*, 133 S. Ct. at 1433 (quoting *Behrend*, 655 F.3d at 206 holding the court of appeals simply concluded that respondents “provided a method to measure and quantify damages on a class-wide basis,” finding it unnecessary to decide “whether the methodology [was] a just and reasonable inference or speculative.”). If the bar were lowered for class certification then very large classes may be certified even though there may be multiple issues present. This would prove to be problematic for both plaintiffs and defendants. Plaintiffs may not have their issues fully represented, and defendants would face difficulties addressing all the various issues in one case.

¹²⁷ Mullenix, *Proponents supra* note 118, at 25; *See Wright*, Miller & Cooper 7AA FEDERAL PRACTICE & PROCEDURE § 1785.4 (describing decertification of prior certification orders).

¹²⁸ Mullenix, *Proponents supra* note 118, at 25.

¹²⁹ *Id.*; *See also In re Constart Int’l Inc. Sec. Litig.*, 585 F.3d 774, 780 (3d Cir. 2009) (quoting *Newton*, 259 F.3d at 162) (“[c]lass certification is an especially serious decision, as it ‘is often the defining moment in class actions (for it may south the “death knell” of litigation on the part of plaintiffs, or create un-

The issue for the majority, as the dissent addressed, is that Comcast never brought up specific objections to the plaintiff's proffered expert testimony until later in the lawsuit.¹³⁰ The tough questions regarding admissibility and reliability of the evidence should have been addressed before the class was certified. As the majority correctly asserted, because the lower courts simply certified the class without undertaking a more in-depth look at the expert testimony, it was unclear if certification was proper.¹³¹ Because appellate courts often give great deference to a trial court's certification of the class, the original determination of proper certification must not be handed down lightly.¹³² Therefore, while the majority's holding in *Comcast* provides further clarification for the requirements of Rule 23(b), it does not fully address the deference that must be awarded to expert testimony in determining if the evidence meets the requisite standards.

B. Dissent's Analysis

While the dissent did not believe that *Comcast* sets forth any future standards, which it certainly does, it did present many strong arguments that must be acknowledged. Justices Ginsburg and Breyer argued that this decision did not create any new black letter law, but they failed to acknowledge that the holding clarifies for lower courts and future class action suits the strict requirement of a rigorous analysis.¹³³ When the Supreme Court de-

warranted pressure to settle nonmeritorious claims on the part of the defendants).

¹³⁰ *Comcast*, 133 S. Ct. at 1435–36 (Ginsburg J. dissenting).

As it turns out, our reformulated question was inapt. To preserve a claim of error in the admission of evidence, a party must timely object to or move to strike the evidence . . . Comcast did not object to the admission of Dr. McClave's damages model under Rule 702 or *Daubert*. Consequently, Comcast forfeited any objection to the admission of Dr. McClave's model at the certification stage. At this late date, Comcast may no longer argue that respondents' damages evidence was inadmissible.

¹³¹ *Id.* at 1434–35. The majority asserts that the lower court, where certification was deemed proper, did not employ the necessary level of scrutiny.

¹³² See, e.g., *Behrend*, 655 F.3d at 189 (citing *Hydrogen Peroxide*, 552 F.3d at 312) (reinforcing the importance of class certification for both plaintiffs and defendants).

¹³³ *Comcast*, 133 S. Ct. at 1437 (Ginsburg, J. & Breyer, J., dissenting); See *Hydrogen Peroxide*, 552 F.3d at 316 (holding that the requirements of Rule 23 do not only apply to the pleadings, but also often "overlap between a class certification requirement and the merits of a claim", but a rigorous analysis is still necessary).

cided the decertification of the class they noted that the predominance requirement set forth in this rule was a “demanding” one.¹³⁴ While the dissent emphasized the dictum offered in *Amchem*, its argument is not as strong as the majority’s because *Amchem* also reinforced the principles of the “rigorous analysis” required by *Falcon*.¹³⁵

The dissent, or at minimum Justice Kagan, seemed to suggest that the current bench cannot find a class action suit it finds compelling.¹³⁶ While the rigor of class certification has increased over time, there is a concern that overly strict standards will remove the only vehicle for litigation plaintiffs may possess.¹³⁷ Given that this may be the only option, plaintiffs would logically want a certain level of judicial scrutiny placed on the evidentiary record.¹³⁸ This would in turn prevent large corporate defendants from including inadmissible evidence, which would obliterate the possibility for class certification.¹³⁹ Thus, while certain justices might be concerned with the trend that class actions appear to be taking in the 21st century, it seems that there are advantages not only for class action defendants, but also for the potential class plaintiffs.¹⁴⁰

However, the concern regarding access to justice for these plaintiffs is not without merit.¹⁴¹ At the same time, despite the clarification and rigorous analyses now being employed during class action certification, litigants continue to pursue this type of

¹³⁴ Klonoff, *Antitrust supra* note 40, at 4 (quoting *Ortiz*, 119 S. Ct. at 2312).

¹³⁵ *Id.*

¹³⁶ Hurley, *supra* note 2.

¹³⁷ Mullenix, *Proponents supra* note 118, at 17 stating “[d]efendants should recognize and concede that a denial of class certification in some types of cases may indeed leave many plaintiffs without effective representation.”

¹³⁸ Mullenix, *Proponents supra* note 118, at 21; *See Szabo*, 249 F.3d at 676 (noting that once a class is certified in the district court, in most circumstances this is the final word on the subject).

¹³⁹ Mullenix, *Proponents supra* note 118, at 21.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 28; *See Whirlpool*, 678 F.3d at 421 (explaining that the cost of litigation is a large enough deterrent for individuals contemplating pursuing an alternate litigation route than class action); *See also* Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U. L. REV. Colloquy 34, 37 (2011) (explaining how when individuals with small claims are often deterred from challenging large corporations or other employers because of the many procedural hurdles and how this “effectively immuniz[es] companies from complying with the law.”).

action.¹⁴² While advocates of class actions make strong arguments that increased rigor is now being employed in class determinations, there is often a failure to accept that this additional rigor is fostering a more just system.¹⁴³

C. Congressional Intervention to Clarify Rule 23 and its Evolving Interpretations

Some scholars suggest that the Court may not be the most effective mechanism for clarifying the requirements of Rule 23.¹⁴⁴ One suggestion included the recommendation that Congress enact an amendment that would provide judges the opportunity to use discretion when determining whether class actions would be the best way to remedy the issue at hand.¹⁴⁵ However, this approach seems problematic because it would cause likely a lack of consistency throughout the law based on jurisdiction or even based on judge. Without clarification regarding how deep the evidence must be examined, there is opportunity on both sides for parties to provide inadmissible evidence as support for why class certification is or is not proper.¹⁴⁶ In the event Congress would not want to add an additional amendment, but may wish to provide further clarification than what the courts have offered, there is opportunity for additional Advisory Committee Notes.¹⁴⁷

The options for further clarification are not limited to revising the Rules of Civil Procedure, but may also include editing the Manual for Complex Litigation.¹⁴⁸ This text is a judicial handbook published by the Federal Judicial Center, which offers insight into how the judiciary should best manage complex litiga-

¹⁴² Mullenix, *Proponents supra* note 118, at 29.

¹⁴³ *See Id.* (suggesting “[w]hat the past twenty years teaches is that the class certification process has become better, not worse, and has improved the quality of lawyering and judicial decision-making.”); *See also* Robert Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1305 (explaining that “an erroneous denial of certification does not necessarily doom the class action completely . . . the named plaintiffs, if they continue with individual suits, might be able to obtain later reconsideration of a negative certification decision when more information is available”).

¹⁴⁴ Mullenix, *Proponents supra* note 118, at 13.

¹⁴⁵ *See* Proposed Rules: Amendments to Federal Rules, 167 F.R.D. 523, 559 (1996) (proposed Rule 23(b)(3)(F)).

¹⁴⁶ Mullenix, *supra* note 118, at 16.

¹⁴⁷ *Id.* at 17.

¹⁴⁸ *Id.* at 32.

tion.¹⁴⁹ Federal judges who seek clarification on certain litigation matters often look to this handbook for guidance.¹⁵⁰ In its current form, the Manual does not provide insight into the evidentiary standard that must be observed at the time of class certification.¹⁵¹ Therefore, one suggestion is for this text to be revised to provide further insight, if the Court wishes to avoid drastically altering black letter law.¹⁵²

Because the majority in *Comcast* at least somewhat dove into the admissibility standards, it was not—as the minority believed—a case that will be irrelevant in future matters. Since the Supreme Court in *Comcast* reiterated to lower courts that there must be meaningful scrutiny especially in terms of Rule 23(b), further guidance is offered into the standards that must be met for certification to be proper.¹⁵³ By clarifying the need for judicial scrutiny, this decision greatly impacts the future of class actions and prevents the abuse from plaintiff attorneys asserting that class action is the only option, when individual suits may very likely suffice.¹⁵⁴

V. IMPACT

Undoubtedly, the main consequence of this case is an increased burden on potential class action plaintiffs and an increased difficulty for class actions to survive judicial review, in large part, because the holding places a higher burden on consumers to prove that injury exists before damages can be properly

¹⁴⁹ See generally MANUAL FOR COMPLEX LITIGATION (FOURTH) (2004) (offering federal judges guidance on best practices for various litigation matters, including class actions).

¹⁵⁰ Mullenix, *supra* note 118, at 32; See also MANUAL FOR COMPLEX LITIGATION (FOURTH) §23.25 (2004) (providing that Rule 702 and *Daubert* have “always required that expert testimony ‘assist the trier of fact’ to understand evidence or resolve issues in the case”).

¹⁵¹ Mullenix, *supra* note 118, at 32; See also Joanna C. Schwartz, *Gateways and Pathways in Civil Procedure*, 60 UCLA L. REV. 1652, 1685 (2013) (explaining the extent in which the Manual For Complex Litigation offers guidance for litigating class actions).

¹⁵² Mullenix, *supra* note 118, at 32 (stating “[r]evising . . . to include . . . a specific evidentiary requirement has the virtue of providing federal judges with an authoritative source upon which to rely in determining on how to properly evaluate class certification motions.”).

¹⁵³ *Id.* at 17.

¹⁵⁴ *Id.*

awarded.¹⁵⁵ Consumers must provide admissible evidence displaying eligibility, on a class-wide basis, for damages at the certification stage before the case may move forward.¹⁵⁶

The most practical impact stemming from the holding in this case is that Rule 23(b)(3) now requires a much more rigorous analysis, which would need to occur when determining liability, causation, and damages.¹⁵⁷ While the rule does not require damages to be exact, damages need to be consistent with the liability theory.¹⁵⁸ Plaintiffs must demonstrate that damages can be established on a class-wide basis, but defendants can usurp the classification of a class if they can prove individual damages.¹⁵⁹ In practical effect, this likely means that class certification may occur later in the legal process than in past cases.¹⁶⁰ Practically speaking, this will likely be beneficial for the plaintiff class because it will allow them more time to prepare discovery and solidify their argument, ensuring that class certification is proper.¹⁶¹ Ultimately, this will increase their chances for recovery.¹⁶² Defendants should also now be aware of the importance of making an argument for a *Daubert* analysis early on in the proceedings.

This case further emphasizes that expert evidence may not be sufficient if it does not tie the accepted legal theory behind the suit to the calculation of damages. This seems to create an even greater burden on plaintiffs who, as in *Comcast*, allege multiple theories of liability. Hypothetically, experts then would be required to calculate damages for each individual theory and the various combinations of theories; thus, if the district court had held that two of the four proposed theories of antitrust behavior were supported, then the damage model would have to include solely those two accepted theories.

¹⁵⁵ *Comcast*, 133 S. Ct. at 1435.

¹⁵⁶ *Id.*

¹⁵⁷ Shepard Goldfein & James Keyte, 'Comcast Corp. v. Behrend': *Yet More Rigor for Certifying Class Actions*, 249 N.Y. L. J. No. 97 (May 21, 2013).

¹⁵⁸ *Comcast*, 133 S. Ct. at 1435.

¹⁵⁹ *Visa Check*, 280 F.3d at 140 (stating "[t]here are some situations where courts have determined that a case is not manageable as a class action because of the necessity for individualized damages determinations.").

¹⁶⁰ Allen, *supra* note 6.

¹⁶¹ *Id.*

¹⁶² *Id.*

A. *Supreme Court Cases in the Wake of Comcast: Additional Roadblocks Implemented by the Roberts Court to Class Actions*

Comcast is not the only class action dispute that received much attention.¹⁶³ Out of the seven class action related cases recently heard by the Court, only one decision was in favor of the plaintiff class.¹⁶⁴ This recent trend places a greater burden on consumers who now have to demonstrate their compliance with Rule 23 in a greater way. While at face value, some may argue that this is detrimental to consumers in general, there may be deeper benefits. The *Comcast* holding ensures that class action suits with the most merit will be heard as opposed to cases where a class is improperly certified in the first instance.

The final case the Supreme Court heard on class actions this term was *American Express v. Italian Colors Restaurant*, which resulted in another strong dissent that alleged the current make up of the bench would greatly diminish the future of class action suits.¹⁶⁵ The majority held that the Federal Arbitration Act (“Act”) does not permit the judiciary to nullify an arbitration agreement that contains a contractual waiver preventing class actions simply because the cost of individual litigation or arbitration would exceed the recovery.¹⁶⁶ This suit began as a dispute

¹⁶³ The seven cases include: *Comcast*, 133 S. Ct. 1426, *Amgen, Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1184 (2013), *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013), *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), *Oxford Health Plans, LLC v. Sutter*, 133 S. Ct. 2064 (2013), *Maracich v. Spears*, 133 S. Ct. 2191 (2013) and *American Express*, 133 S. Ct. 2304.

¹⁶⁴ Hurley, *supra* note 2 (discussing *Amgen* which was the only business defendant this past term which lost in class action case, but many argue that this was extremely limited in application); *See generally* *Amgen, Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1384 (2012).

¹⁶⁵ *American Express*, 133 S. Ct. at 2313 (Kagan, J., dissenting).

¹⁶⁶ *Id.* at 2312; *See* Peter B. Rutledge & Christopher R. Drahozal, “Sticky” Arbitration Clauses?: *The Use of Arbitration Clauses after Concepcion*, 13 (August 15, 2013), available at <http://ssrn.com/abstract=2306268> (asserting that the court had in large part decided in favor of enforcing the arbitration agreement because there was no Congressional intervention requiring the court to reject arbitration agreement); *See also id.* at 14 n. 73 (suggesting “Congress might enact legislation restricting the enforceability of arbitral class waivers, although the prospects of any statutory change are slight. In addition, the Consumer Financial Protection Bureau has authority to regulate arbitration clauses in consumer financial services contracts under Section 1028(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, after it completes its

about an arbitration clause's waiver of class action suits between petitioners, American Express, and respondents, who were merchants that accept American Express credit cards as payment.¹⁶⁷ The respondents, as in *Comcast*, alleged a violation of the Sherman Antitrust Act and a violation of the Clayton Act.¹⁶⁸ However, per the terms of the arbitration agreement, to fight American Express on the alleged violation would be a foolish undertaking due to the many procedural bars set forth in the agreement.¹⁶⁹ *American Express* involved a question of legality regarding an arbitration clause in a contract with American Express that prevents any opportunity to resolve the dispute.¹⁷⁰ The Court attempted to answer how the Act affects arbitration clauses and the effect on consumers or small businesses that conduct business with large corporations.¹⁷¹ These arbitration agreements prevent class actions from forming.¹⁷² This decision in large part affirmed the Court's previous ruling in *AT&T Mobility v. Concepcion* that held that arbitration agreements could prevent consumers from forming classes for suit under state law.¹⁷³ The general principle of the Act is that arbitration agreements, regardless of antitrust claims, are contractual and therefore, must be rigorously en-

statutorily mandated study. See 12 U.S.C. 5518(b) (offering a vehicle to restrict mandatory pre-dispute arbitration).

¹⁶⁷ *American Express*, 133 S. Ct. at 2304.

¹⁶⁸ *American Express*, 133 S. Ct. at 2306; See also Brief for Respondents at 5–6 *American Express v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (No. 12-133) (providing details of the plaintiffs claims against American Express).

¹⁶⁹ *American Express*, 133 S. Ct. at 2310.

¹⁷⁰ *Id.* at 2307; See also 1 McLaughlin on Class Actions § 2:14 (9th ed.) (discussing the common law contract defense of unconscionability may be used as a tool to overcome certain provisions that may prevent an opportunity to litigate).

¹⁷¹ *American Express*, 133 S. Ct. at 2307.

¹⁷² See generally *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012) (reiterating that the Federal Arbitration Act mandates courts to enforce arbitration agreements in all circumstances except when there is exists congressional intent suggesting otherwise); but see *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (noting that nothing in the Sherman Act suggests that Congress had the intention of preventing a waiver of class-action procedure).

¹⁷³ *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011) involved a class of consumers who alleged that ATT fraudulently advertised free cellphones for individuals who sign up for cellphone service and contract. However, the Federal Arbitration Act preempted the law in California (the state in controversy) law, which held that arbitration agreements are unenforceable if they prevent consumers from forming a class.

forced.¹⁷⁴

In support of their motion, petitioners offered evidence that demonstrated the cost of obtaining expert evidence that would be necessary to prove the existence of support for antitrust allegations.¹⁷⁵ The petitioners' expert witness, an economist, noted that for an individual trying to prove his or her contention, the cost would be at least several hundred thousand dollars with the possibility of an even greater cost.¹⁷⁶ This is important in light of the majority's rationale in *Comcast*, which forces plaintiffs to match theories of liability with provable damages.¹⁷⁷ Thus, in the event that multiple consumers can come together to form a class, the cost for expert analysis in support of their contentions would be even more costly which alone, may constitute a great enough deterrent for many who feel intimidated to go up against large corporations, primarily because of financial reasons. Although the Court of Appeals held that the waiver was unenforceable because of its deterring effects, the Supreme Court held that the subject arbitration agreement must be treated as a contract and thus was enforceable.¹⁷⁸

As in *Comcast*, this case led to a strong split in the bench and another heated dissent.¹⁷⁹ Justice Kagan led this charge and stated that the current conservative majority will likely never find a class action that it finds acceptable.¹⁸⁰ The dissent presented a valid opinion that the arbitration agreement, due to the many procedural bars it required, insulated American Express from any liability stemming from potential antitrust behaviors, and leaves merchants who accept this type of credit card with limited recourse.¹⁸¹

Does *American Express* burden the consumer even more

¹⁷⁴ 9 U.S.C.A. § 2 (West).

¹⁷⁵ *American Express*, 133 S. Ct. at 2307.

¹⁷⁶ *Id.* at 2308; *but cf.* *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (stating that Court may decline to enforce an arbitration agreement if costs of arbitration are so high that they preclude individuals from asserting their rights under the agreement).

¹⁷⁷ *Comcast*, 133 S. Ct. at 1433.

¹⁷⁸ *American Express*, 133 S. Ct. at 2312; *See Rodriguez v. United States*, 480 U.S. 52, 525-26 (1987) (noting that antitrust laws do not guarantee that a path to remedy will be affordable for all potential plaintiffs).

¹⁷⁹ *American Express*, 133 S. Ct. at 2313 (Kagan, J., dissenting).

¹⁸⁰ *Id.* at 2320 (Kagan J., dissenting).

¹⁸¹ *Id.* at 2312 (Kagan J. Dissenting) (arguing that this decision bypasses years of precedent that aim to prevent arbitration clauses from preventing consumers from having any mechanisms for remedy or redress).

than the strict requirements set forth in *Comcast*? It would appear so. It has been suggested that congressional interference would help clarify, specifically in antitrust disputes the relationship between the Federal Arbitration Act and the Sherman Antitrust Act.¹⁸² The worry expressed by a passionate Justice Kagan, was that the Federal Arbitration Act had the potential to insulate corporations or large entities from any liability, because of the limitations prescribed by the arbitration clause.¹⁸³ However, the majority held that, given the absence of any clarification or intervention by Congress, contract law must govern.¹⁸⁴ While the Federal Arbitration Act dictated in this case, *American Express* creates yet another impediment to the future of class action suits.

B. The Uncertain Future of the Role of a Daubert Analysis in Class Actions

While *Comcast* may provide clarity in the strict interpretation of Rule 23 and the importance of a “rigorous analysis” at the class certification stage, not all issues have been resolved.¹⁸⁵ When the case reached the court of appeals, the question for the judges pertained to the applicability of the *Daubert* analysis in class action cases.¹⁸⁶ Under the *Daubert* analysis, it is the responsibility of the judge at the trial level to determine that evidence, including expert testimony, offered by both sides is relevant and reliable.¹⁸⁷ The Supreme Court has applied this rule to expert tes-

¹⁸² Philip Bump, *The Problem with the Supreme Court’s AmEx Decision, Class Action, and You*, THE ATLANTIC WIRE (June 20, 2013), <http://www.thewire.com/national/2013/06/supreme-court-american-express-italian-colors/66443/>. Because both the Federal Arbitration Act and the Sherman Antitrust Act are federal statutes, neither can override each other. See U.S. CONST. art. VI, cl. 2 (describing that preemption only applies where a federal law and a state law conflict, but there is no statutory basis suggesting the solution when two federal laws conflict).

¹⁸³ Bump, *supra* note 182 (quoting Justices Ginsburg and Breyer in *Comcast*, “the monopolist gets to use its monopoly power to insist on a contract effectively depriving its victim of all recourse.”).

¹⁸⁴ *Id.*

¹⁸⁵ *Comcast*, 133 S. Ct. at 1433.

¹⁸⁶ *Behrend*, 655 F.3d at 216; See Goldfein, *supra* note 157 (discussing to what extent *Daubert* applies to the examination of expert testimony in class certification).

¹⁸⁷ Klonoff, *Antitrust*, *supra* note 40, at 17 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 507 U.S. 579 (1993)) (noting, “the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”).

timony in the examination of principles, methodology, and conclusions.¹⁸⁸ Because *Daubert* was not a class action dispute, there has been some uncertainty on the application of the standard in class actions.¹⁸⁹ Early Supreme Court cases, including *Eisen*, never performed a *Daubert* analysis because courts at that time were often hesitant to delve into the merits of the case at the certification stage.¹⁹⁰ However, the shift to a deeper analysis is evident by the Supreme Court's reasoning in *Wal-Mart v. Dukes*.¹⁹¹

Some suggested that the Supreme Court in *Comcast* would determine whether *Daubert* needs to be raised as a challenge by the defendants or if it even has a place in the class certification process.¹⁹² When the Supreme Court granted certiorari it reformulated the question, to determine if the expert's model needed to be admissible under the *Daubert* analysis for the purposes of proper class certification.¹⁹³ However, the *Daubert* analysis was never fully raised by Comcast in the lower courts despite the burden being placed on the defendants to raise this issue at trial.¹⁹⁴

¹⁸⁸ Klonoff, *Antitrust*, *supra* note 40, at 17. However, the author suggests that lower courts have often refused to apply *Daubert* at the certification level in class action antitrust suits. This stems from the belief that only a preliminary inquiry is necessary at the certification stage. *See, e.g., In re Polypropylene Carpet Antitrust Litig.*, 996 F. Supp. 18, 26 (N.D. Ga. 1997) (holding that deciding the admissibility of expert testimony under the *Daubert* standard is not necessary at the class certification stage). However, this sentiment is evolving after *Comcast*.

¹⁸⁹ Mullenix, *Proponents*, *supra* note 118, at 24 (noting that in recent years, even without an explicit *Daubert* rule in regards to class actions, courts have begun to delve more into the essence of both plaintiffs' and defendants' expert testimony offered, in large part because blindly accepting a plaintiff's expert testimony would result in certification for virtually every class before the court).

¹⁹⁰ *See Eisen*, 417 U.S. at 177 (holding that the language in Rule 23 does not suggest that the court has authority to conduct an inquiry into the merits of the suit at the class certification of stage).

¹⁹¹ *See Campbell*, *supra* note 21, at 472–73 (noting that *Wal-Mart* established a heightened standard for what qualifies as a “common question”, and due to this, the future of successful nationwide or regional discrimination class actions appears bleak).

¹⁹² Gordon, *supra* note 189, at 2.

¹⁹³ *Comcast*, 133 S. Ct. at 1435 (Ginsburg, J. & Breyer J., dissenting); *See Campos*, *supra* note 86 (explaining how the original question was altered by the Court and how this impacted its decision).

¹⁹⁴ *Comcast*, 133 S. Ct. at 1436 (Ginsburg J. & Breyer, J., dissenting); *See Gordon*, *supra* note 189, at 2 (noting that *Comcast* was a perfect opportunity for the Supreme Court to resolve the role of *Daubert* at the certification stage, but the Supreme Court had valid reason to not fully address it because *Com-*

Typically, when an objection is made in respect to a *Daubert* analysis, the court conducts an inquiry regarding the class certification on the testimony presented.¹⁹⁵ Instead, the *Comcast* majority focused on the degree of rigorousness required under 23(b)(3) inquiries.¹⁹⁶ Thus, while the Court had the opportunity to provide a clear rule for the role of *Daubert*, it did not do so and that determination will need to be made in a future case.

C. Difficulties of Interpretation of Comcast in the Lower Courts

While the dissenters in *Comcast* correctly asserted that the case does not create new black letter law,¹⁹⁷ they failed to acknowledge the implications this may have on future class action cases at the certification stage.¹⁹⁸ The Seventh Circuit has heard numerous class action suits since the opinion in *Comcast* was decided.¹⁹⁹ The issue of common questions versus common answers was apparent in the subsequent case *RBS Citizens v. Ross*, which was a smaller class action suit involving allegations of violations of Illinois' overtime laws.²⁰⁰ The Seventh Circuit upheld the certification of class, where the employer, RBS, contended that the plaintiff failed to identify a common issue because of the many individual liability inquiries that were present.²⁰¹ The court held that this class was comprised of only about 2,000

cast failed to raise the issue early in the case).

¹⁹⁵ Klonoff, *Antitrust*, *supra* note 40, at 18; *See Visa Check*, 280 F.3d at 132, n. 4 (explaining that "*Daubert* requires an inquiry distinct from that for evaluating expert evidence in support of a motion for class certification.").

¹⁹⁶ Goldfein, *supra* note 157; *but see* Campbell, *supra* note 21 (suggesting that *Comcast* implies that courts should now "engage in *Daubert* analysis and rigorous second-guessing of the plaintiffs' claims, rather than simply considering whether, if the evidence is persuasive to the jury, the plaintiffs could prove their case.").

¹⁹⁷ *Comcast*, 133 S. Ct. at 1436 (Ginsburg, J. & Breyer, J., dissenting).

¹⁹⁸ *See* Bone, *Misguided*, *supra* note 9, at 50 (theorizing that the holding in *Comcast* will make issue classifying more difficult because it requires not only a common question of fact or law, but also common damages).

¹⁹⁹ Hurley, *supra* note 2.

²⁰⁰ *Ross v. RBS Citizens, N.A.*, 667 F.3d 900, 902 (7th Cir. 2012), *cert. granted, judgment vacated*, 133 S. Ct. 1722 (2013). Current and former bank employees filed the case alleging that the RBS Citizens denied them overtime pay in violation of both the Fair Labor Standards Act and the Illinois Minimum Wage Law (IMWL). For the IMWL claim, the district court certified two classes, one for hourly workers and one for Assistant Branch Manager employees.

²⁰¹ Dinkoff, *supra* note 89.

individuals and the type of evidence necessary to offer was easily distinguished.²⁰² The United States Supreme Court granted the motion to vacate and remand, signaling that the decision in *Comcast* will not be treated lightly.²⁰³ This further denotes that not only must plaintiffs establish, during the certification stage, that damages may be calculated on a class-wide basis, but further again emphasizes the importance of common answers to causation and damages at the trial level.

Another class action dispute, *Butler v. Sears, Roebuck & Co.*, arose out of the Seventh Circuit.²⁰⁴ Judge Posner wrote the opinion, which overturned the district court's holding, and granted certification of the class.²⁰⁵ While the lower court disagreed, plaintiffs alleged that they met their burden of proving the requirements of certification were satisfied.²⁰⁶ Judge Posner in his opinion held that the class should be certified as a matter of judicial efficiency.²⁰⁷ This conflicts with the holding in *Comcast*, because not all of the plaintiffs suffered the alleged problem disput-

²⁰² *Id.*

²⁰³ See *RBS Citizens, N.A. v. Ross*, 133 S. Ct. 1722 (2013) (holding that the judgment is vacated and remanded back to the seventh circuit given the decision in *Comcast*); See also *Roach v. T.L. Cannon Corp.*, 2013 WL 1316452 (N.D.N.Y. 2013) (holding in light of *Comcast* the request for certification under Rule 23(b)(3) is denied in a wage and hour case because plaintiffs did not successfully demonstrate that damages could be calculated on a class wide basis).

²⁰⁴ *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359 (7th Cir. 2012), *cert. granted, judgment vacated*, 133 S. Ct. 2768, and *judgment reinstated*, 2013 WL 4478200 (7th Cir. Aug. 22, 2013). This case involved a consumer class action against a retailer of washing machines alleging problems of mold and a defect causing washing machines to suddenly stop.

²⁰⁵ *Butler*, 702 F.3d at 364; See *Whirlpool Corp.*, 678 F.3d at 421 (holding, in a factually similar case, that both the elements of Rule 23(a) and 23(b)(3) were satisfied).

²⁰⁶ *Butler*, 702 F.3d at 361. This case involved two separate suits. There were two classes of individuals, one that suffered from a mold claim and another that suffered from a defect causing the machine to stop. The district court denied certification to the class who complained of the mold problem and certified the class with the defect in the control unit. Plaintiffs for the mold claim put forth evidence to support certification under Rule 23(b)(3), the court determined that this evidence was sufficient in reversing the district court's denial of certification.

²⁰⁷ *Butler*, 702 F.3d at 364; See also *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 410 (5th Cir. 1998) (stating that "[i]t is important to remember that the class action device exists primarily, if not solely, to achieve a measure of judicial economy, which benefits the parties as well as the entire judicial system.").

ed.²⁰⁸ The petition for certiorari raised two questions: specifically (1) whether Rule 23(b)(3)'s predominance requirement could be met on the grounds that it would be more judicially efficient to try the single common question as opposed to also considering the individual differences and varying issues of the individual class members; and (2) whether a class can be certified even though a majority of the members did not experience the dispute at issue.²⁰⁹

The petition to the Supreme Court was granted, vacated and remanded for further consideration given the decision in *Comcast*.²¹⁰ While it appears that Judge Posner would likely agree with the dissent in *Comcast*, the holding appears to be reinforced and unchanging.²¹¹ This further suggests the Supreme Court is adamant on the application of *Comcast* in subsequent cases and that judicial efficiency is not simply a way to usurp the ruling.

In the wake of these cases, it appears that there is still some confusion in lower courts how to apply the standards clarified and set forth in *Comcast*.²¹² This sentiment was addressed in *Jacob v. Duane Reed, Inc.*, which was a class action dispute heard in the Southern District of New York.²¹³ The Judge in *Jacob* noted that lower courts are struggling to determine the scope of the *Comcast* holding.²¹⁴ He noted that there are three categories of decisions that are emerging post-*Comcast*: (1) courts differenti-

²⁰⁸ The suit included over twenty-seven different types of front-loading washers. Further, the plaintiffs included individuals who do not actually suffer from any mold problem in their washer.

²⁰⁹ See generally *Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768 (2013) (granting certiorari in light of the decision in *Comcast*).

²¹⁰ *Butler*, 133 S. Ct. at 2768. However, upon remand Judge Posner again held that the case was properly certified despite the holding in *Comcast*. *Butler*, 727 F.3d at 799.

²¹¹ This is evident in the Supreme Court's recent grants of certiorari, which vacated the decisions of the lower courts and remanded for further proceedings. See *Butler*, 133 S. Ct. at 2768, and *Whirlpool Corp.*, 133 S. Ct. at 1722.

²¹² See generally *Jacob v. Duane Reade Inc.*, 289 F.R.D. 408 (S.D.N.Y. March 20, 2013). But see generally *Jacob v. Duane Reade Inc.*, 293 F.R.D. 578 (S.D.N.Y. 2013) (denying certification for both the damages and liability claims). On reconsideration in light of *Comcast*, the court held that issue of damages could not be resolved on a class-wide basis. The court certified the class solely on the issue of liability, as damages would need to be calculated through the use of individualized proof, which would prevent the class from meeting the predominance requirement under Rule 23(b)(3). *Id.* at 595.

²¹³ *Jacob*, 293 F.R.D. at 581.

²¹⁴ *Id.*

ating the fact pattern from the facts found in *Comcast* and suggesting a common formula to meet the predominance standard; (2) courts noting that there is no common formula present for the calculation of damages and thus applying *Comcast*; and (3) courts somewhat applying the standard set forth in *Comcast* and using Rule 23(c)(4) to employ only a liability standard as opposed to also calculating damages in the same stage.²¹⁵

Although *Comcast* does not explicitly provide guidance regarding Rule 23(c)(4), in light of the holding the Supreme Court recently vacated and remanded a case similarly to *Butler* in *Whirlpool Corp., v. Glazer*.²¹⁶ In *Whirlpool*, the Sixth Circuit emphasized that the question of liability should be tried as a class action and the issue of damages may be treated individually at a later time.²¹⁷ Besides separating the issue of liability and damages, the Sixth Circuit suggested separating the class into small subclasses for determining damages.²¹⁸ This approach did not come up during the discussion of *Comcast*, but may have been an alternative for the plaintiffs to address in the event that they reworked the damage model accounting for the one successful liability theory and the various counties involved.

The lower courts appear to be grappling with cases that involve only liability issues and how *Comcast* would apply in those scenarios.²¹⁹ It appears then that *Comcast* will most often be applied and followed in cases where liability and damages are in dispute, with an emphasis placed on the fact that the theory of liability is tied to the theory on damages.²²⁰ Thus, an inquiry into the relationship between damages and theories of liability is prudent prior to consideration of certification.²²¹

²¹⁵ *Id.*

²¹⁶ *Jacob*, 293 F.R.D. at 593; *See Whirlpool Corp.*, 133 S. Ct. at 1722 (holding that in light of *Comcast* the decision needed to be remanded back to the sixth circuit to be reassessed).

²¹⁷ *Whirlpool Corp.*, 678 F.3d at 421.

²¹⁸ *Id.*

²¹⁹ *Jacob*, 293 F.R.D. at 587 (citing to *Whirlpool II* where the Court distinguishes between cases like *Comcast* and cases that solely deal with liability issues). In sum, these courts view *Comcast's* scope of *Comcast* to be more limited especially when damages are not at issue.

²²⁰ *Id.* (quoting *Comcast*, 133 S. Ct at 1435) ("The first step in a damages study is the translation of the legal theory of the harmful event into an analysis of the economic impact of that event.").

²²¹ *Id.* at 588.

CONCLUSION

Comcast v. Behrend is an example of the evolution of class action and reemphasized the importance of proper certification. By ensuring that the lower courts employ a stricter interpretation of implementing a rigorous analysis, it ensures proper certification. While at first glance the holding appears to place a greater burden on consumers, the future does not seem hopeless for potential consumer classes. The case in *Comcast* could have easily been decided the other way if the damage model presented matched the accepted theories of liability to their respective damages. This suggests that while *Comcast* will undoubtedly have an impact on future cases, the applicability may not be as detrimental to consumers as commentators have suggested. In reality, this holding provides further guidance to potential classes seeking certification. The documentation submitted during discovery will most likely need to be more in depth than was the case in the past. Thus, *Comcast* will be influential in the future of class actions to the benefit of both parties. By requiring evidence to be scrutinized at a higher standard, consumers are awarded some protection from being denied certification based on inadmissible evidence. By delving into the merits early on, it helps courts ensure that certification is proper.

While the holding in *Comcast* will alter the procedure lower courts employ in determining class certification, it appears there is still some confusion. Lower courts have distinguished liability cases from lawsuits involving both liability and damages. Another potential consequence is the increased use of subclasses to assist in determining damages. The use of subclasses was not discussed in *Comcast*, but would have likely altered the majority's ruling.

While the Court had the opportunity to delve into the application of a *Daubert* analysis but failed to thoroughly address it, the Court did reinforce the idea that circuit courts can no longer refuse to rigorously analyze Rule 23. However, because the decision was so recent, and circuits are already finding ways to distinguish cases, it is unclear just how far the application of *Comcast* will reach.