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Introduction

In *Comcast Corp. v. Behrend*, the United States Supreme Court held that class certification must be rejected under the predominance requirement of Rule 23(b)(3) of the Federal Rules of Civil Procedure when named plaintiffs' evidence of damages fails to isolate only those injuries attributable to theories of liability accepted by the court.[1] In *Comcast*, the named plaintiff cable subscribers alleged in a class action complaint that the defendant, Comcast Corporation, engaged in anticompetitive conduct of both "swapping" service areas and "acquiring" competitors in violation of Sections 1 and 2 of the Sherman Act.[2] The class certification predominance inquiry considers whether plaintiffs can prove at trial with evidence common to the class the three elements of a private antitrust action: 1) a violation of antitrust law, 2) antitrust impact (also known as individual injury), and 3) measurable damages.[3] To meet this showing with respect to the second and third elements, plaintiffs relied on two expert analyses. First, plaintiffs produced a report by Dr. Michael Williams proffering four distinct theories of antitrust impact. Second, plaintiffs produced a regression model developed by Dr. James McClave that estimated aggregate overcharging damages from Comcast's anticompetitive conduct, without attributing damages to any single theory of antitrust impact. When the district court rejected three of Dr. William's four theories of antitrust impact as unsuitable for class action treatment, it was left with the question ultimately answered by the U.S. Supreme Court – have plaintiffs sufficiently proven that class-wide damages are capable of proof at trial if their only evidence presented fails to isolate injuries attributable to accepted theories of antitrust impact?

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[1] *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013).
[2] *Behrend v. Comcast Corp.*, 264 F.R.D. 150 (E.D. Pa. 2010), *aff'd*, 655 F.3d 182 (3d Cir. 2011), *rev'd*, 569 U.S. 27, (2013).
[3] *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 311, 312 (3d Cir. 2008), *as amended* (Jan. 16, 2009).

In a 5-4 majority opinion for Comcast, Justice Scalia answered this question in the negative—plaintiffs' damages model was insufficient to prove predominance on damages because it included estimates from theories of antitrust impact found unsuitable for class treatment by the district court. Justice Scalia then denied class certification, applying a premise from the lower court that class certification requires predominance to be met separately for both elements of antitrust impact and damages. Justices Ginsburg and Breyer's dissent attempted to narrow the holding of Justice Scalia's opinion, citing precedent that class certification does not require predominance to be met separately for both antitrust impact and damages. This spirited debate between the majority and dissent is motivated at the core by vastly differing interpretations of whether the Supreme Court was reviewing the sufficiency of plaintiffs' damages model evidence *de novo* as a matter of law, or for "clear error" as a matter of fact.

Despite *Comcast's* potential to heighten the Rule 23(b)(3) requirement for class certification, its actual impact has been largely constrained by its application in practice by the lower courts. In the early years following the decision, confusion ensued as courts inconsistently struggled to interpret the decision.[4] Immediately after Comcast, a small number of courts read the decision broadly to reject class certification when plaintiffs' damage models failed to meet the predominance standard. Over time, however, most courts have come to apply *Comcast* as Justice Ginsburg likely intended—only in rare circumstances with very similar facts and almost never as the sole reason to reject class certification.[5] More frequently, lower courts distinguish from *Comcast*,[6] finding the thrust of Justice Scalia's reasoning either satisfied or inapplicable. Still, to

[4] Alex Parkinson, *Comcast Corp v Behrend and Chaos on the Ground*, 81 Univ. Chic. Law Rev., 1213, 1223 (2014).
[5] 2 W. Rubenstein, Newberg on Class Actions § 4:54 (6th ed. 2022).
[6] 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1778 (3d ed. 2023).

this day trial courts occasionally accept defendants' *Comcast* arguments, so it is worth learning the interpretive contours lower courts have drawn over the last decade.

This paper aims to disentangle the law and facts of the *Comcast* decision and to consider its impact in the subsequent decade. Part I traces the factual and procedural developments of *Comcast* in the District Court for the Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit, providing background of the class certification predominance standards ultimately reviewed by the U.S. Supreme Court. Part II identifies the rule in *Comcast*, determines why the majority rejected the named plaintiffs' evidence as insufficient to permit class certification, and determines how and why the dissent differed from the majority. Lastly, Part III evaluates how *Comcast* has been applied in the subsequent decade of antitrust cases through the lens of the three primary legal propositions supporting the Court's holding.

Part I: Background

1. *Comcast* in the Eastern District of Pennsylvania: Allegations, Law, and Findings

Comcast v. Behrend began in 2003 with a complaint by named plaintiffs on behalf of a putative class of Philadelphia-area cable subscribers against the defendant, Comcast Corporation, for allegedly charging supracompetitive rates for "non-basic cable" cable programming services.[7] Plaintiffs alleged that instead of directly competing with other cable providers, Comcast divided and allocated cable markets through a series of "swap" and "acquisition" transactions with competitors designed to geographically "cluster" Comcast systems.[8] The

[7] Behrend v. Comcast Corp., 2003 WL 23906553, 6 (E.D. Pa.) (Trial Pleading).
[8] Id.

plaintiffs alleged that this conduct enabled Comcast to acquire and maintain monopoly power and, as the "only game in town," raise prices for consumers.[9] Plaintiffs brought a private suit for injunctive relief and treble damages under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, alleging violations of both Sections 1 and 2 of the Sherman Act.[10]

In 2007, the district court certified the class[11] under Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure.[12] However, two years later, the district court granted Comcast's motion to reconsider certification due to the Third Circuit's opinion in *In re Hydrogen Peroxide Antitrust Litig.*, which held that class certification requires a district court to use "rigorous analysis" to resolve legal and factual disputes relevant to making Rule 23 findings by preponderance of the evidence.[13] In granting this motion, the district court upheld its prior findings that plaintiffs met their burden to satisfy the four prerequisites of Rule 23(a) and the superiority element of 23(b)(3).[14] The last remaining issue for the district court to consider was whether named plaintiffs adduced sufficient evidence to demonstrate that common issues of law and fact predominate under Rule 23(b)(3).

The district applied the conjunctive proposition that to meet predominance, named plaintiffs were required to adduce class-wide evidence with respect to each of the three elements[15] of a private class action claim: 1) a violation of antitrust law, 2) antitrust impact (also known as

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[9] Id.
[10] Id.
[11] *Behrend v. Comcast Corp.*, No. CIV.A. 03-6604, 2007 WL 2972601 (E.D. Pa. Oct. 10, 2007) (also certifying a Chicago class, which was consolidated in multidistrict litigation in the Eastern District of Pennsylvania).
[12] Fed. R. Civ. P. 23.
[13] *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 307 (3d Cir. 2008), *as amended* (Jan. 16, 2009) (vacating and remanding for failing to thoroughly examine expert testimony in support of the Rule 23(b)(3) predominance requirement).
[14] *Behrend v. Comcast Corp.*, 264 F.R.D. 153 n.1 (E.D. Pa. 2010), *aff'd*, 655 F.3d 182 (3d Cir. 2011), *rev'd*, 569 U.S. 27, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013) (limiting reconsideration to the 23(b)(3) predominance inquiry, with agreement from the defendant).
[15] *Id.* at 156 (citing *Weisfeld v. Sun Chem. Corp.*, 210 F.R.D. 136, 141 (D.N.J. 2002)).

individual injury), and 3) measurable damages.[16] The district court dedicated just a single sentence to this requirement, citing another district court opinion that drew its original authority from a private antitrust action case in the Third Circuit outside the class action context.[17] The minimal attention dedicated to this essential class certification legal standard would come to play a central role in the subsequent controversy surrounding the *Comcast* decision.

In contrast, the district court devoted considerable time and analysis to examining named plaintiffs' evidence in support of predominance. Following the prevailing standard in the Third Circuit, the district court sought to perform "rigorous analysis" to determine if plaintiffs' legal claim met predominance by demonstrating the capability of proof at trial with evidence common to the class.[18] To conduct this rigorous analysis, the district court held a four-day evidentiary trial to evaluate plaintiffs' evidence in support of predominance regarding impact and damages.

To prove that impact is capable of proof common to the class at trial, plaintiffs relied on four theories of liability analyzed by Dr. Michael Williams, all of which allegedly raised expanded basic cable prices for putative class members.[19] First, Comcast reduced competition from Direct Broadcast Satellite (DBS) services by withholding Comcast Sportsnet (CSN) programming (hereinafter the "DBS penetration" theory). Second, through its clustering activities, Comcast reduced competition from rival cable operators that "overbuild" wireline in existing Comcast service areas (the "overbuilder" theory). Third, Comcast's clustering conduct reduced "benchmark competition," the phenomenon of consumers comparing, and thus constraining prices of alternative cable service offerings (the "benchmark competition" theory). Fourth, Dr.

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[16] *Id.* at 156 (citing *Hydrogen Peroxide*, 552 F.3d at 323, 325).
[17] *Id.* at 156 (citing *Weisfeld v. Sun Chem. Corp*., 210 F.R.D. 136, 141 (D.N.J. 2002), which also devotes little exposition to the mandatory nature of proving predominance on all three elements of a private antitrust claim, deriving this proposition from the Third Circuit's decision in a non-class action case, *Danny Kresky Enter. Corp. v. Magid*, 716 F.2d 206, 209–210 (3d Cir.1983)).
[18] *Id.* at 156 (citing *Hydrogen Peroxide*, 552 F.3d at 323, 325).
[19] *Id.* at 162-181.

Williams suggested that Comcast's clustering increased its bargaining power with cable network content providers, allowing it to simultaneously negotiate lower prices to acquire programming and higher prices when offering those channels to customers (the "bargaining power" theory).

Of these four antitrust impact theories, the district court only accepted the second—the "overbuilder" theory—as satisfying the predominance requirement of capability of proof at trial on a class-wide basis.[20] Comcast's withholding of CSN ("DBS penetration" theory) was found not susceptible to class-wide proof because the timing of Comcast's CSN decisions predated the class period.[21] The district court found Dr. William's analysis on the "benchmark competition" theory unusable as class-wide proof because it failed to offer any impactful link between benchmark competition and consumer injury.[22] For instance, Dr. Williams relied on unpersuasive literature demonstrating the impact of benchmark competition on regulators like public utilities and phone services within franchised monopolies. The district court found that any benchmarking impact on regulators could not be assumed to translate to a class of consumers. The district court disregarded Dr. Williams' only "benchmark competition" evidence addressing consumers—a survey of consumer awareness of consumer benchmarks—because it established no causal link between awareness of alternative cable providers and reduced "benchmark competition." Lastly, in support of the "bargaining power" theory Dr. Williams constructed a theoretical clustering model with assumptions about network and cable operator incentives and access to information. The district court rejected this theory as capable of class-wide proof at trial because it relied on several unsupported theoretical assumptions, such as unilateral information to negotiating parties.[23]

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[20] *Id.* at 174-175.
[21] *Id.* at 165-166.
[22] *Id.* at 175-178.
[23] *Id.* at 178-182.

For each of these rejected theories, the district court performed "rigorous analysis" to determine whether they were capable of proof at trial through evidence common to the class. It did not, however, find on the merits that each theories had no impact on prices for any possible subclass of consumers. For instance, the district court technically left open the possibility of meeting predominance for an alternatively defined class of consumers who purchased service prior to Comcast's alleged conduct foreclosing DBS competition. Likewise, the courts did not suggest that the "benchmark competition" and "bargaining power" theories had no impact on non-basic cable prices. Rather, the evidence provided by plaintiffs did not meet the burden for class treatment.

To prove the capability of adducing class-wide damage estimates, named plaintiffs presented Dr. James McClave's damage model entirely separate from Dr. Williams' impact analysis. Dr. McClave's damage model was a multiple-regression analysis designed to estimate the difference between Comcast's alleged supracompetitive pricing and rates but-for Comcast's anticompetitive conduct. [24] Dr. McClave constructed the regression model by first creating a control group of counties outside the Philadelphia Designated Market Area (DMA) with market characteristics intended to mirror the competitive climate in Philadelphia but for Comcast's alleged anticompetitive conduct. Dr. McClave identified counties for the control group that met three screening conditions: 1) counties with Comcast subscriber penetration rate of 40% (Philadelphia DMA's midpoint during the class period), 2) counties with Alternative Delivery System including Direct Broadcast Satellite (DBS) penetration at or above the national average of 40%, and 3) counties with at least 15% penetration of one or more wireline companies offering service

[24] *Id*. at 182.

in addition to Comcast.[25] The treatment group consisted of the counties in the Philadelphia region throughout the alleged class period of anticompetitive clustering conduct.

Dr. McClave's regression model is not disclosed in the public record. However, the model likely looked something like

$$P = C_0 + C_1 \times A + C_2 \times X_2 + \cdots C_n \times X_n$$

where P, the dependent variable, is the price of expanded non-basic cable. Independent variables included A, a dummy-variable for anticompetitive conduct generally (i.e., clustering) and X_{2-n}, which represents relevant control characteristics such as median income and fixed effects like yearly macroeconomic trends. Estimated coefficients C_{0-n} represent the average effect of each corresponding independent variable on price. The key estimate of interest is C_1, which represents the average increase in non-basic cable price in counties due to the presence of anticompetitive clustering conduct. Dr. McClave used a model like this to estimate the average impact of Comcast's anticompetitive clustering conduct on prices, aggregated across all putative class members in the Philadelphia DMA.

The district court found that by measuring clustering activity generally (i.e., by estimating the coefficient, C_1, corresponding to the single dummy-variable, A), the model was agnostic to any specific theory of liability and, thus, was not impeached by the rejection of Dr. Williams' impact theories.[26] In particular, the district court rejected Comcast's protestations that Dr. McClave's screening conditions used to construct the but for control group necessarily depend on Dr. Williams' accepted and rejected theories of antitrust impact. Most notably, Comcast argued that Dr. McClave's control group screening requirement of above average DBS penetration maps to

[25] *Id* at 182.
[26] *Id*. at 190-191.

Dr. Williams' "DBS penetration" impact theory, which was rejected as unsuitable for class certification. The district court rejects this modelling critique because Dr. McClave merely used the DBS screening requirement to select counties for comparison, not as a direct cause of supra-competitive pricing.

In dismissing these econometric concerns, the district court accepted Dr. McClave's theory-agnostic damages model as sufficient evidence to measure and quantify damages on a class-wide basis, as required by the Rule 23(b)(3) predominancy inquiry.[27]

2. *Comcast* in the Third Circuit

The United States Court of Appeals for the Third Circuit affirmed the district court's finding that named plaintiffs met the Rule 23(b)(3) predominance standard for both antitrust impact and damages. Regarding Dr. McClave's damages model, the Third Circuit found no abuse of discretion in the district court's determination that Dr. McClave's model used standard econometric methodology capable of proving class-wide damages at trial.[28] Like the district court, the Third Circuit majority minimally discussed the requirement that predominance be met separately with respect to both impact and damages in a conjunctive test. Rather, the majority focused its analysis of legal standards on the proposition that class certification does not require a district court to determine on the merits whether methodological inferences are just or

[27] *Id.* at 190-91.
[28] *Behrend v. Comcast Corp.*, 655 F.3d 182 (3d Cir. 2011), *rev'd*, 569 U.S. 27 (2013) (citing IIA Phillip E. Areeda et al., *Antitrust Law* ¶ 394 (3d ed.2007)).

reasonable, because such evaluations can be made at trial.[29] In doing so, the Third Circuit believed it was reviewing the district court's application of a legal standard, *de novo*.[30]

In a notable dissenting opinion, Circuit Judge Jordan raised several issues that ultimately framed key arguments in Justice Scalia's majority opinion for the US Supreme Court. Judge Jodan reframed Comcast's critique of Dr. McClave's damages model as inadmissible under the *Daubert* fit requirement, *sua sponte*.[31] He inherently accepted Comcast's argument that after the district court rejected three of plaintiffs' four theories of antitrust impact, Dr. McClave's model no longer fit the sole remaining theory of liability, in the *Daubert* sense.[32] In response to Judge Jordan, the majority suggested that even if Dr. McClave's model had *Daubert* issues, the district court could reasonably certify the class and allow the plaintiffs to cure such issues before trial.[33]

Part II: *Comcast* in the US Supreme Court

In a 5-4 decision, the United States Supreme Court reversed the judgement by the Third Circuit, holding that named plaintiffs failed to meet the Rule 23(b)(3) predominance requirement for class certification.[34] In the majority opinion, Justice Scalia relies on three legal propositions. First, he asserts that predominance on damages fails when named plaintiffs' only class-wide evidence is a regression model that aggregates estimates from both accepted and rejected antitrust theories (hereinafter the "predominance on damages" proposition).[35] As discussed in Part III, *infra*, some lower courts have adopted a more general version of this proposition—that

[29] *Id.* at 207.
[30] *Id.* at 189.
[31] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).
[32] *Behrend v. Comcast Corp.*, 655 F.3d 218 (3d Cir. 2011), *rev'd*, 569 U.S. 27 (2013).
[33] *Id.* at 204 n.13.
[34] *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013).
[35] Proposition names are included for the clarity of this paper and were not used by the Court in *Comcast*.

predominance on damages requires class-wide evidence that matches plaintiffs' theories of liability. Second, Justice Scalia applies the proposition used by the district court that class certification pursuant to Rule 23(b)(3) requires predominance to be met separately with respect to both antitrust impact and damages (the "both impact and damages" proposition) . Third, reviewing the lower courts' decisions *de novo*, Justice Scalia implicitly advanced a third key proposition, that whether evidence presented satisfies the Rule 23(b)(3) predominance inquiry is a legal, rather than a factual question (the "standard of review for sufficiency of the evidence" proposition). The following section analyzes Justice Scalia's application of these propositions and discusses how and why the dissent differed in its reasoning.

First, regarding the "predominance on damages" proposition, Justice Scalia held that both lower courts were incorrect in finding predominance met with respect to damages. According to the majority, although damage "calculations need not be exact,"[36] they must be consistent with plaintiffs' liability case.[37] Justice Scalia cited no Court precedents for this approach, but rather developed it from the "unremarkable premise" that plaintiffs can only ever recover from cognizable damages.[38] Applying this rule, the majority held that both lower courts should have required plaintiffs to tie damage calculations to each theory of antitrust impact. Because Dr. McClave's damages model did not disaggregate the effects of each impact theory, its overall estimate erroneously included components of damages attributable to those impact theories

[36] *Id.* at 35 (citing *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, 75 L.Ed. 544 (1931)).
[37] *Id.* at 35 (citing ABA Section of Antitrust Law, Proving Antitrust Damages: Legal and Economic Issues 57, 62 (2d ed. 2010)).
[38] *Id*. at 35.

rejected by the district court as inappropriate for class treatment.[39] As Dr. McClave's model was the plaintiffs' *only* evidence offered as proof of class-wide damages, the majority held that predominance was not met with respect to damages.

Second, regarding the legal proposition that class certification requires predominance to be met separately for both impact and damages, Justice Scalia makes no lengthy exposition or overt assertions that this is the correct requirement of Rule 23(b)(3). Rather, he simply applied the "both impact and damages" proposition as held by the district court and as uncontested by the parties before the Court.[40] As discussed in Part I, *supra*, the district court indeed applied this proposition with minimal legal justification authority. In terms of the parties, the petitioners' brief argued for this proposition by citing to the minimal language within the Third Circuit's *Comcast* majority opinion.[41] Part of the "oddity" of *Comcast*, as noted by the dissent, is that respondents' brief never formally rebutted this core proposition that class certification requires meeting predominance separately for both impact and damages.[42] At oral argument, respondents

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[39] Recall from Part I, *supra*, the example reconstruction of Dr. McClave's damage model with a generalized, theory-agnostic dummy-variable for anticompetitive clustering conduct. Contrast that model with the hypothetical, disaggregated regression specification,

$$P = B_0 + B_1 \times DBSPenetration + B_2 \times OverbuilderCompetition + B_3 \times BenchmarkCompetition + B_4 \times BargainingPower + B_5 \times X_5 \ldots + B_n \times X_n,$$

where again P, the dependent variable, is the price of expanded non-basic cable, but now each of Dr. Williams' four theories of antitrust impact are separately represented by independent dummy variables. The average, county-wide effect of each theory on price is represented by coefficients B_{1-4}, with characteristic control variables still represented by X_{5-n}. Such an alternate specification directly addresses Justice Scalia's critique of the sufficiency of Dr. McClave's actual model, because even when the district court rejected the "DBS penetration," "benchmark competition," and "bargaining power" theories as insufficient for class treatment, this model would still be able to isolate acceptable class-wide damage estimates for the accepted "overbuilder competition" theory. This alternate specification is hypothetical, of course, and likely would have been impossible for named plaintiffs' experts to create due to data limitations.

[40] *Id*. at 30.

[41] Brief for Petitioner at 8, *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013) (No. 11-864).

[42] Brief for Respondent, *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013) (No. 11-864); Perhaps this is due to the "oddity" of this case, discussed by the dissent, that the Court revised the question presented twice, ultimately stating a proposition that was never briefed by respondents. *Comcast Corp. v. Behrend*, 569 U.S. at 42 (Ginsburg, J., dissenting). After Comcast petitioned the court to answer whether a district court can certify a class without resolving "merits arguments" that bear on Rule 23, *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), *petition for cert.*

agreed with Justice Kagan that the standard applied by the district court was "tougher standard than should be the test, but… embrace[d] that test."[43] Justice Scalia nonetheless applied this broad proposition to hold that because named plaintiffs failed to meet predominance on damages, class certification must be reversed.

Justices Ginsburg and Breyer's dissent opposed the majority both on procedural grounds and on the substance of the majority's reasoning. In contrast to the majority, the dissent focused more on the majority's second proposition—that class certification requires meeting predominance separately for both impact and damages—perhaps to make the majority's holding "good for this day and case only"[44] and with respect only to the first proposition. Justices Ginsburg and Breyer then stated that class certification does *not* require predominance to be met both with respect to impact and damages, citing a significant body of lower court precedents spanning class actions in antitrust, employment law, and consumer protection.[45] They explained that the policy intent underlying Rule 23(b) was to allow efficient relief for classes of plaintiffs impacted by a common harm, despite the need to determine damages individually.[46] Thus, even if the majority was correct that named plaintiffs failed to meet predominance with respect to damages, this would not end the prospect of class certification. Such framing allowed the dissent to attempt to limit the majority's rule to only Justice Scalia's first proposition, without directly disputing it.

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filed, WL 3613365 (U.S. Aug. 17, 2012) (No. 11-864), the Court instead certified a question framed around whether district courts may certify a class without resolving whether the plaintiff has introduced admissible evidence under *Daubert* that is susceptible of proof of class-wide damages, *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), *cert. granted*, 567 U.S. 933 (U.S. Jun. 25, 2012) (No. 11-864). However, when it became clear that Comcast waived its *Daubert* objections, the Court instead answered the question "whether class certification is improper because respondents failed to establish that damages could be measured on a class-wide basis. *Comcast Corp. v. Behrend*, 569 U.S. 30 (2013) (Ginsburg, J., framing the majority's question answered). The dissent calls this reframing "unfair to respondents" and would have dismissed the case as improvidently granted. *Id.* at 41 (Ginsburg, J., dissenting).

[42] *Comcast Corp. v. Behrend*, 569 U.S. 42 (2013) (Ginsburg, J., dissenting).

[43] Transcript of Oral Argument, *Comcast Corp. v. Behrend*, 569 U.S. 42 (2013) (No. 11-864).

[44] *Comcast Corp. v. Behrend*, 569 U.S. 42 (2013) (Ginsburg, J. dissenting).

[45] *Id.* at 42. (Ginsburg, J., dissenting).

[46] *Id.* at 41 (Ginsburg, J., dissenting and citing Advisory Committee's 1966 Notes on Fed. Rule Civ. Proc. 23, 28 U.S.C.App., p. 141*)*.

At the heart of the debate between the *Comcast* majority and dissent is a fundamental disagreement about a third legal proposition, whether evaluating the sufficiency of evidence for class certification pursuant to Rule 23(b)(3) is a finding of fact or law. The majority implicitly suggested it was reviewing whether Dr. McClave's regression model met the predominance standard *de novo.* Justice Scalia accepted the district court's factual and legal findings with respect to antitrust impact, focusing on a key detail—that the district court did not reject three of the four theories of impact because they had no econometric effect on consumer prices, just that they were unsuitable for class treatment.[47] Accepting the factual finding that Dr. McClave's model *may* account for non-zero effects of the rejected theories of liability, Justice Scalia suggested that he was reviewing the district court's legal finding that plaintiffs' evidence was sufficient to meet the predominance standard.

On the other hand, Justices Ginsburg and Breyer thought the majority made factual findings that could not be justified under the "clear error" standard of review. In particular, the dissent suggested that Justice Scalia made an interpretation of *how* the model worked, rather than *what* it said.[48] The dissent asserted that Justice Scalia's alleged factual interpretation was unsupported by the record. However, unlike Justice Scalia, who accepted the district court's reasoning for rejecting three of plaintiffs' four theories of liability, Justices Ginsburg and Breyer disregarded the district court's reasoning as "not here relevant,"[49] before pointing out that petitioner-Comcast argued in district court that these rejected theories "had no impact on prices."[50] The dissent notes the implication of this alternative interpretation—if the three rejected theories had no impact on price, then Dr. McClave's regression model would have perfectly measured class-wide

[47] *Comcast Corp. v. Behrend*, 569 U.S. 31 n.3 (2013).
[48] *Id*. at 47 (Ginsburg, J., dissenting).
[49] *Id*. at 46 (Ginsburg, J., dissenting)..
[50] *Id*. at 47 (Ginsburg, J., dissenting)..

damages.[51] The dissent thus constructed an alternative interpretation of the district court's factual findings upheld by the Third Circuit, which it suggested should not be disturbed under a "clearly erroneous*"* standard of review. Defending against this critique, Justice Scalia suggested that had the district court made the dissent's alternative interpretation, it would have been "obvious[ly] and exceptional[ly]" erroneous.[52] While this reasoning fortified the outcome of Justice Scalia's majority opinion, it also muddied the waters as to which standard of review he actually relied on in the holding.

In summary, although Justice Scalia applied three legal propositions to reject class certification in *Comcast*, complicating factors made it less clear which of these premises would persist as applicable rules beyond the case. For instance, the first proposition suggesting that predominance on damages fails in the presence of an overly inclusive regression estimate was a novel assertion that may or may not apply outside the scope of *Comcast*'s specific facts. The second proposition, requiring predominance to be met separately with respect to both impact and

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[51] Recall and contrast, again, the theoretical reconstruction of Dr. McClave's model from Part I, *supra*,

$$P = C_0 + C_1 \times A + C_2 \times X_2 + \cdots C_n \times X_n$$

with the hypothetical alternative model specification *supra* note 39,

$$P = B_0 + B_1 \times DBSPenetration + B_2 \times OverbuilderCompetition + B_3 \times BenchmarkCompetition + B_4 \times BargainingPower + B_5 \times X_5 \ldots + B_n \times X_n$$

Under Justice Scalia's interpretation of the district court's factual findings, B_2, the coefficient estimating the effect of the single viable theory on consumer prices in the hypothetically disaggregated model is not necessarily equal to C_1, the coefficient estimating the effect on consumer prices using a dummy-variable that aggregates all anticompetitive conduct. This is because coefficients B_1, B_3, and B_4 are not necessarily statistically insignificant—these mechanisms *may* impact price, just not in a way common to the defined class. In contrast, the dissent suggests the Comcast argued in the district court that these three coefficients representing rejected antitrust impact theories were statistically insignificant. If such econometric justification were the true reason the district court rejected these theories, Justice Ginsburg argues that as designed, Dr. McClave's model is perfectly tailored to measure class-wide damages, because the equations are essentially equivalent (i.e., B_1, B_3, and B_4 are statistically insignificant, and $B_2 = C_1$).

[52] *Comcast Corp. v. Behrend*, 569 U.S. 36 n.5 (2013) (Justice Scalia suggests it would be "obviously and exceptionally erroneous" if Dr. McClave's model were interpreted to establish damages solely attributable to the "overbuilder" theory).

damages was straightforwardly applied, but never advocated for by Justice Scalia and fiercely contested by the dissent. Lastly, not only was the third proposition regarding the standard of review for predominance evidence presented only addressed implicitly by the majority, but Justice Scalia's insistence that the outcome would have held even under a "clearly erroneous" standard muddied the waters as to the proper standard of review. In the following decade, it would be up to the lower courts, or a subsequent Court decision, to decide how to interpret these propositions.

Part III: *Comcast's* Decade of Minimal Impact in the Lower Courts

Although the dissent tried to limit *Comcast* to "this day and case only,"[53] the Court must have meant to deliver a new applicable rule, as it remanded five cases in the next six months for reconsideration in light of the decision.[54] In the first two years after the decision, much confusion ensued as district and circuit courts attempted to interpret and apply *Comcast*'s various potential propositions.[55] As discussed in Part II, *supra*, the *Comcast* majority produced three legal propositions—the "predominance on damages," "both impact and damages," and "standard of review for sufficiency of the evidence" propositions—any of which could have been applied post-*Comcast* by lower courts when evaluating class certification requirements under Rule 23(b)(3).

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[53] *Comcast*, 569 U.S. at 42 (Ginsburg J., dissenting).
[54] *RBS Citizens v. Ross*, 569 U.S. 901 (2013); *Whirlpool Corp. v. Glazer*, 569 U.S. 901 (2013); *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66 (2013); *Sears, Roebuck and Co. v. Butler*, 569 U.S. 1015 (2013); *Fifth Third Bancorp v. Arlington Video Productions, Inc.*, 571 U.S. 801 (2013).
[55] *See* Alex Parkinson, *Comcast Corp v Behrend and Chaos on the Ground*, 81 Univ. Chic. Law Rev., 1213, 1223 (2014) (grouping district and circuit courts into four distinct interpretive "bins" in the immediate two-year aftermath of *Comcast*).

Some lower courts initially interpreted the majority holding broadly by accepting the "predominance on damages" and "both impact and damages" propositions and rejecting class certification when plaintiffs' damage evidence indicated the need to compute individualized damages.[56] Over time, however, most circuits began to narrowly interpret *Comcast* as only requiring plaintiffs to show that "damages stemmed from the defendants' actions that created the legal liability," for purposes of finding predominance on damages, which they hold is not a mandatory requirement for certification.[57] Despite accepting the "predominance on damages" proposition, many courts avoid needing to apply *Comcast* by distinguishing on the facts.[58] The Supreme Court never directly clarified or overruled *Comcast*, but rather cites the decision for foundational class certification principles[59] and even to resurface Justice Ginsburg and Breyer's concern that the Court invites error when resolving complex questions without the benefit of a full briefing.[60] However, lower courts frequently support their *Comcast* interpretations using the dicta and holdings from the pre and post-*Comcast* decisions in *Wal-Mart v. Dukes* and *Tyson Foods v. Bouaphakeo*, respectively.[61]

Because post-*Comcast* interpretation occurred exclusively in the lower courts, the following section will trace the history and contours of how these district and circuit courts approach each of the three legal propositions relied on by Justice Scalia's majority opinion.

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[56] *See, e.g., Martin v. Ford Motor Co.*, 292 F.R.D. 252 (E.D.Pa., 2013) (denying four proposed classes in a design defect case due to the highly individualized nature of computing damages based on resale value, among other factors).
[57] *See, e.g., Leyva v. Medline Indus.*, 716 F.3d 510, 514 (9th Cir.2013).
[58] *See, e.g., Zakaria v. Gerber Products Co.*, 2017 WL 9512587, at *17 (C.D.Cal., 2017) (distinguishing allegations by a class of infant formula buyers from *Comcast*, as it advanced only a single theory of liability whereas *Comcast* had four).
[59] *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014); *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, 141 S.Ct. 1951, 1955 (2021).
[60] *See Daimler AG v. Bauman*, 571 U.S. 117 (2014) (Sotomayor, J., concurring, taking issue with the majority "bypassing the question on which we granted certiorari to decide an issue not litigated below").
[61] *See, e.g., Vaquero v. Ashley Furniture Indus.*, 824 F.3d 1150 (9th Cir. 2016) (citing *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016)); *Leyva v. Medline Indus.*, 716 F.3d 510, 514 (9th Cir.2013) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (U.S., 2011)).

1. The "Predominance on Damages" Proposition in the Lower Courts

Both in the short and long term following *Comcast*, a number of circuit and district courts affirmed the language of the majority's predominance on damages proposition that "a model purporting to serve as evidence of damages in [a] class action must measure only those damages attributable to that theory."[62] This language has been paraphrased by courts, for example that a district court errs when it premises Rule 23(b)(3) decisions on damage measurements that are incompatible with plaintiffs' theory of liability,[63] that damages must stem from defendants' actions that created the legal liability,[64] and that the theory of liability should be limited to injury caused by the defendants.[65] Given this broad consensus in principle–what does it actually mean in practice? Does this reasoning narrowly apply to the fact pattern in *Comcast* involving multiple impact theories, when only are some accepted, but all are included in an aggregate damages model? Or does *Comcast* more broadly require courts to dismiss class-wide evidence of that are plagued by other issues of individualization?

Although there have been many cases over the last decade involving plaintiff damages models that are attributed to multiple theories of liability, few face the exact issue reached in *Comcast*.[66] In situations where all of plaintiffs' theories of liability remain in the case, defendants have tried to argue that *Comcast* stands for the broad proposition that plaintiffs must proactively disaggregate damage estimates attributable to each model, to avoid future predominance issues.[67]

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[62] *Butler v. Sears, Roebuck and Co.*, 727 F.3d 796 (7th Cir. 2013).
[63] *See In re Deepwater Horizon*, 739 F.3d 790, 815 (5th Cir. 2014).
[64] *See Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013).
[65] *See In re Nexium Antitrust Litig.*, 777 F.3d 9, 18 (1st Cir. 2015).
[66] *See In re Mushroom Direct Purchaser Antitrust Litig.*, 319 F.R.D. 158, 207 (E.D. Pa. 2016) (finding *Comcast* concerns inapplicable because the two primary claims remained in the case).
[67] *See In re Processed Egg Prod. Antitrust Litig.*, 312 F.R.D. 171, 192-193 (E.D. Pa. 2015).

However, the Third Circuit rejected this proposition in *In re Processed Egg Prod. Antitrust Litig.*, reminding defendants that the Supreme Court implied in *Comcast* that plaintiffs' methodology "might have been sound… if all four of those alleged distortions remained in the case."[68] *In re Processed Eggs* elaborates that such a reading of *Comcast* exceeds predominance requirements and would require plaintiffs to produce evidence that mitigates any potential future developments in a case, approaching a merits inquiry that is not required at the class certification stage.

Other courts have upheld *Comcast*'s "predominance on damages" proposition, while avoiding its application, by finding that the plaintiffs advance a single theory of impact. For instance, upon post-*Comcast* remand from the Supreme Court, in the breach-of-warranty case of *Butler v. Sears, Roebuck, and Co.*, the Seventh Circuit found that unlike *Comcast,* there was no possibility that damages would be attributed to the wrong liability theories, because a mold class of plaintiffs solely attributed damages to mold and a control-unit-unit class of plaintiffs solely attributed damages to a control-unit defect.[69]

Analogously, in employment suits, some courts have found the connection between liability and damages so close as to inherently meet the *Comcast* requirement.[70] That is, when an employer injures employees by under compensating them for services, damages necessarily flow from this single cause of harm to plaintiffs.[71] However, some courts see more nuance in wage and hour cases, suggesting that employees may be underpaid for different reasons or due to

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[68] *See id*. (quoting *Comcast*, 569 U.S. at 1434).
[69] *See Butler v. Sears, Roebuck and Co.*, 727 F.3d 796, 800 (7th Cir. 2013).
[70] *See Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 943 (9th Cir. 2019) ("[P]redominance in employment cases is rarely defeated on the grounds of differences among employees so long as liability arises from a common practice or policy of an employer.") (quoting 7 Newberg on Class Actions § 23:33 (5th ed. 2012)); *Day v. Celadon Trucking Servs., Inc.*, 827 F.3d 817 (8th Cir. 2016).
[71] *See Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1155 (9th Cir. 2016) ("Defendants either paid or did not pay their sales associates for work performed. No other factor could have contributed to the alleged injury.").

different activities, which might not flow from the same liability theory.[72] For example, unlike in *Tyson Foods*,[73] in which the class consisted of employees who were all under-compensated for time spent donning and doffing protective gear, in *Ferreras v. Am. Airlines, Inc.* and *Oztimurlenk v. United States*, various types of employees were undercompensated for different reasons.[74] State courts have also taken issue with damages evidence that fails to distinguish exempt and nonexempt employees for purposes of the predominance inquiry.[75]

In the antitrust context, many courts have similarly found *Comcast* satisfied or circumvented when damages are tailored to a single theory of liability.[76] Courts have even used the unique conspiratorial and monopolistic nature of antitrust suits to tie together multiple aspects of anticompetitive conduct into a single theory. For example, in *In re Modafinil Antitrust Litig.*, a case involving an alleged conspiracy between brand name and generic drug manufacturers to delay generic entry, the district court accepted a damage model that estimated but-for prices had two to five generics been introduced to market. The court did so without directly attributing injuries caused by any of five generics allegedly conspiring independently with the brand manufacturer and even after rejecting a global conspiracy claim among the generics.[77] The Third Circuit affirmed the district court's economic reasoning that if any generic defected on its contract with the brand manufacturer, all the generics would defect. Thus, all generics were found to be joint and severally liable, in a sense reducing to a single theory of liability mitigating any potential *Comcast* issues. The Third Circuit similarly accepted a three-

[72] *See Oztimurlenk v. United States*, 162 Fed.Cl. 658, 692 (Fed. Cir., 2022) (distinguishing the common employment practices of donning and doffing in *Tyson Foods* from substantial variability in employment practices) (quoting *Ferreras v. Am. Airlines, Inc.*, 946 F.3d 178 (3d Cir. 2019)).
[73] *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016).
[74] *See id.*
[75] *See Duran v. U.S. Bank Nat'l Assn.*, 59 Cal. 4th 1, 325 P.3d 916, 940 (2014).
[76] *See In re Niaspan Antitrust Litig.*, 397 F.Supp.3d 668, 689 (E.D.Pa., 2019) (distinguishing from *Comcast* because the jury would be presented with evidence in support of the single liability theory of delaying generic competition).
[77] *See In re Modafinil Antitrust Litig.*, 837 F.3d 238 (3d Cir. 2016), *as amended* (Sept. 29, 2016).

part theory of impact and accompanying damages model involving suppression of generic medications for purposes of predominance on damages in *In re Suboxone Antitrust Litig.*, viewing these three components as part of a broader set of monopolistic conduct, to be considered as a whole theory of liability.[78]

Things get more complicated when plaintiffs' damages model includes estimates for uninjured plaintiffs. In *Comcast*, Justice Scalia offered the possibility that Dr. McClave's estimate, even if properly limited to the "overbuilder theory," might differentially impact class members between counties in an individualized nature.[79] If such differential impact were disparate enough some plaintiffs might be uninjured entirely, though Justice Scalia did not explicitly use this language. Courts have been slow to adopt *Comcast* to reject class certification on these grounds. At least one court facing a generic delay antitrust suit found *Comcast* requirements met during its uninjured class member analysis, because plaintiffs' theory of liability and damage estimates remained limited to the kind of injuries caused by defendants' horizontal price-fixing conspiracy, even in the presence of a *de minimis* number of uninjured plaintiffs.[80] Other courts have rejected predominance on damages, without directly citing *Comcast*, when plaintiffs' models exceed a *de minimis* threshold of uninjured plaintiffs and fail to demonstrate the feasibility of efficiently winnowing this number for damage collection.[81] For example, rather than resolving defendants' *Comcast* unreliability of evidence argument in *In Re*

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[78] *See In re Suboxone Antitrust Litig.*, 967 F.3d 264, 270 (3d Cir. 2020) (The court will "look to the monopolist's conduct taken as a whole rather than considering each aspect in isolation) (quoting *Phila. Taxi Ass'n, Inc. v. Uber Techs., Inc.*, 886 F.3d 332, 339 (3d Cir.).

[79] *Comcast*, 569 U.S. at 38 n.6.

[80] *See In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015) (finding the first part of a three-part uninjured class member analysis met with respect to *Comcast*).

[81] *See In re Rail Freight Fuel Surcharge Antitrust Litig. - MDL No. 1869*, 934 F.3d 619, 625 (D.C. Cir. 2019) (citing *In re Asacol Antitrust Litig.*, 907 F.3d 42, 51-58 (1st Cir. 2018); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 18-22 (1st Cir. 2015)); *But see, In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015) (allowing the class to proceed despite a *de minimis* number of uninjured plaintiffs).

Rail Freight Surcharge Antitrust Litig. II, the D.C. Circuit instead directly addressed the failure of plaintiffs' damages model to prove class-wide injury when it impermissibly estimated negative damages for up to 2,037 (12%) of class members.[82] Other circuits have similarly denied class certification for lack of predominance on damages in the delayed generic context due to unidentifiably uninjured plaintiffs without directly citing *Comcast*.[83]

Outside of the antitrust context, at least one court adjudicating a securities litigation class action recently cited *Comcast* as the reason for rejecting class certification in the presence of unidentifiably uninjured plaintiffs.[84] These securities litigation cases typically involve instances of securities fraud or negligence in which a subset of shareholders would have accepted the risk, even if they had full information about a practice that falsely inflated stock prices. To address this identification challenge, the plaintiffs in *Ford v. TD Ameritrade Holding Corp.* attempted to create a single algorithmic model to estimate economic loss on a per-class member basis using a class-wide dataset of over one hundred million datapoints.[85] The court rejected this approach for predominance on damages as overwhelmed by the need for further individual evidence to support the model. Alternatively, in the unfair and deceptive products context, the Sixth Circuit found a damages model in compliance with *Comcast* in a class action suit against a manufacturer of a defective probiotic nutritional supplement, reasoning that even if some customers were satisfied through a placebo effect, and thus were uninjured, they were still entitled to restitution for reliance on false advertising.[86]

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[82] *See In re Rail Freight Fuel Surcharge Antitrust Litig. - MDL No. 1869*, 934 F.3d 619, 623 (D.C. Cir. 2019) (affirming the district court's chosen *de minimis* uninjured plaintiff threshold of 5-6% and rejecting class certification upon plaintiffs' attempt to substitute revenue share for plaintiff count as an alternative *de minimis* metric).
[83] *See In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018).
[84] *See Indiana Public Retirement System v. AAC Holdings, Inc.*, 2023 WL 2592134 (M.D.Tenn., 2023); *Ludlow v. BP, P.L.C.* 800 F.3d 674, 690 (5th Cir. 2015).
[85] *See Ford v. TD Ameritrade Holding Corp.*, 995 F.3d 616 (8th Cir. 2021).
[86] *See Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015).

In summary, although many courts recite *Comcast's* key proposition that damages must stem from defendants' actions that created the legal liability, most courts avoid needing to apply *Comcast* by distinguishing on the facts, save for a small number of cases spanning domains such as employee under compensation and securities litigation. Although some courts have used *Comcast*-like analyses in response to uninjured and unidentifiable plaintiff defenses, few opinions directly cite the decision to justify rejecting class certification.

2. The "Both Impact and Damages" Proposition

The biggest threat to class action plaintiffs and the greatest cause for "chaos on the ground"[87] after *Comcast* was the potential that lower courts would adopt the broad proposition that class certification requires predominance separately for both impact and damages. Recall that this proposition was necessary for the *Comcast* majority's reasoning, but Justice Scalia merely accepted this requirement as applied by the district court and uncontested by the parties.[88] Within the first year after *Comcast*, some district courts applied this rule broadly, rejecting classes where individual damage calculations would overwhelm common questions.[89] The court in *In Re Rail Freight Surcharge Antitrust Litig. I* even went so far as to proffer a slogan regarding an unacceptable damages model that produced negative estimates for some class members: "no damages model, no predominance, no class certification."[90]

In time, some of these decisions would be overturned on appeal and many circuits ultimately came to instead adopt the sentiment of the *Comcast* dissent, when it stated the "well nigh

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[87] *See* Alex Parkinson, *Comcast Corp v Behrend and Chaos on the Ground*, 81 Univ. Chic. Law Rev., 1213, 1223 (2014).
[88] *See Comcast*, 569 U.S. at 30.
[89] *See Roach v. T.L. Cannon Corp*., No. 3:10-CV-0591 TJM/DEP, 2013 WL 1316452, at *5 (N.D.N.Y. Mar. 29, 2013), *vacated and remanded*, 778 F.3d 401 (2d Cir. 2015*).*
[90] *In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869*, 725 F.3d 244, 253 (D.C. Cir. 2013).

universal"[91] jurisprudence that "individual damage[s] calculations should not scuttle class certification under Rule 23(b)(3)."[92] The pattern in most circuits has been exactly as Justice Ginsburg foretold—both before and after *Comcast*, these courts followed precedents allowing classes to proceed even in the absence of predominance on damages.[93]

The Ninth Circuit has spoken most clearly on the matter, repeatedly reaffirming its pre-*Comcast* rule followed in a line of cases starting with *Blackie v. Barrack* in 1975 through *Yokoyama v. Midland Nat. Life Ins.* in 2010 that "damage calculations alone cannot defeat class certification."[94] In *Vaquero*, the Ninth Circuit traces its post-*Comcast* affirmations of this rule through numerous employment and deceptive products cases,[95] which effectively limit *Comcast* to the "predominance on damages" proposition.

Although the Supreme Court has not yet explicitly clarified, affirmed, or overruled *Comcast*, the Ninth Circuit lays out the blueprint for how lower courts justify their rationale using the Supreme Court's pre-*Comcast* decision in *Wal-Mart v. Dukes* and post-*Comcast* decision in *Tyson Foods v. Bouaphakeo*. For example, the court in *Leyva v. Medline Indus.* reasoned that because in *Wal-Mart v. Dukes* Justice Scalia said that "individualized monetary claims belong in Rule 23(b)(3)," it necessarily follows that the presence of individualized damages cannot, by itself, defeat class certification.[96] Similarly, in *Vaquero,* the Ninth Circuit reasons that its approach to the "both impact and damages" proposition was not disturbed by the Supreme Court in *Tyson Foods*, because there the Court allowed plaintiffs to adduce representative evidence for

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[91] *Comcast*, 569 U.S. at 42 (Ginsburg J., dissenting).
[92] *Id. (*quoting 2 W. Rubenstein, Newberg on Class Actions § 4:54, p. 205 (5th ed. 2012)).
[93] *See, e.g., Yokoyama v. Midland Nat. Life Ins*, 594 F.3d 1087 (9th Cir. 2010).
[94] *Id*. at 1094 (quoting *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975)).
[95] *See Vaquero v. Ashley Furniture Indus.*, 824 F.3d 1155 (9th Cir. 2016); *See also Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161 (9th Cir. 2014); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510 (9th Cir. 2013); *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979 (9th Cir. 2015).
[96] *Leyva v. Medline Indus.*, 716 F.3d 510, 514 (9th Cir.2013) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361 (U.S., 2011)).

both antitrust impact and damages, which implicitly indicates that class certification may be permissible even in the case that either element requires separate trials for individualized evidence.[97]

Most other circuits have adopted reasoning like the Ninth Circuit, including the First,[98] Second,[99] Third,[100] Fifth,[101] Sixth,[102] Seventh,[103] and Tenth Circuits.[104] At least two of these circuits[105] and another district court[106] explain the continuation of their pre-*Comcast* predominance inquiry precedents by citing the exact cases referenced in Justice Ginsburg's *Comcast* dissent. Many lower courts also support this approach by citing the *Comcast* dissent directly.[107] Some circuit decisions overturned district courts that initially interpreted *Comcast* broadly in the early wake of the decision.[108] For instance, in *Roach v. T.L. Cannon Corp.*, the Second Circuit also applied its pre-*Comcast* precedent to hold that the district court was wrong to

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[97] *See Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1155 (9th Cir. 2016) (citing *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016)).
[98] *See In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015).
[99] *See Roach v. T.L. Cannon Corp.*, 778 F.3d 401 (2d Cir. 2015).
[100] *See Neale v. Volvo Cars of N.A., LLC*, 794 F.3d 353, 374 (3d Cir. 2015) (agreeing with the Fifth Circuit that "it is a misreading of *Comcast* to interpret it as preclud[ing] certification under Rule 23(b)(3) in any case where the class members' damages are not susceptible to a formula for class-wide measurement.") (internal quotations omitted).
[101] *See In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014).
[102] *See In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013).
[103] *See Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013).
[104] *See In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1257–58 (10th Cir. 2014) ("Comcast did not rest on the ability to measure damages on a class-wide basis.").
[105] *See In re Deepwater Horizon*, 739 F.3d 811 (5th Cir. 2014) (citing *Bertulli v. Independent Association of Continental Pilots*, 242 F.3d 290, 298 (5th Cir.2001)); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013 (citing *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564–66 (6th Cir.2007).
[106] *See In re Processed Egg Prod. Antitrust Litig.*, 312 F.R.D. 139 n.10 (E.D. Pa. 2015) (citing *Chiang v. Veneman*, 385 F.3d 256, 268 (3d Cir.2004)).
[107] *See, e.g., Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578 (S.D.N.Y. 2013), *aff'd*, 602 F. App'x 3 (2d Cir. 2015).
[108] *See Curtis v. Extra Space Storage, Inc.*, 2013 WL 6073448 (N.D.Cal., 2013); *Cowden v. Parker & Assocs., Inc.*, No. CIV.A. 5:09-323-KKC, 2013 WL 2285163 (E.D. Ky. 2013) ("Plaintiffs have offered no manageable way to calculate damages across the entire class and the individual damages calculations that would be required will inevitably overwhelm any questions common to the entire class.") (stating an initial interpretation contrary to the Ninth Circuit's later consensus); *Martin v. Ford Motor Co.*, 292 F.R.D. 252 (E.D.Pa., 2013) ("The Court is not persuaded that this damages model is sufficient for class certification purposes. The resale price of a used Windstar is based on a multitude of factors, of which the allegedly defective rear axle is but one.") (stating a stringent interpretation of *Comcast* that the Third Circuit would later go on to reject).

deny class certification solely because plaintiffs damage model was not susceptible to class-wide measurement.[109]

Why have so many lower courts rejected the proposition that both impact and damages are required separately for class certification and what does this mean in practice? Lower courts explained that the broadest interpretation of *Comcast* could severely limit plaintiffs' access to the class action device.[110] Worse, some courts acknowledged that rejecting certification because predominance is not met on damages could perversely incentivize defendants to engage in anticompetitive conduct while strategically reaping the benefits of a heightened class action pleading standard.[111]

In practice, there are two options available to courts that allow classes to proceed despite the presence of individualized damages—creating a separate liability class under Rule 23(c)(4) or splitting the class into subclasses under Rule 23(c)(5) of the Federal Rules of Civil Procedure. Under Rule 23(c)(4), courts have the power to determine liability on a class-wide basis and may determine the damages of class members in individual trials or subsequent proceedings, if class-wide impact is proven.[112] This appears to be the more common approach by courts and may be expeditious if parties agree on a damage schedule, conduct brief hearings, or quickly settle in the course of these proceedings.[113] In *Sears, Roebuck, and Co. v. Butler*, the Seventh Circuit indicated that if predominance on impact and damages varies between different groups of plaintiffs within the class, an alternative approach available to district judges may be to divide

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[109] *See Roach v. T.L. Cannon Corp.*, 778 F.3d 401 (2d Cir. 2015) (citing *Seijas v. Republic of Argentina*, 606 F.3d 53, 58 (2d Cir.2010); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008)).
[110] *See Butler v. Sears, Roebuck & Co.*, 727 F.3d 798 (7th Cir. 2013).
[111] *See Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578 (S.D.N.Y. 2013), *aff'd*, 602 F. App'x 3 (2d Cir. 2015) (acknowledging the perverse incentive in the wage and hour context in which disallowing bifurcation of liability and damage classes could give companies license to maintain overtime hours company-wide, but keep predatory one-on-one contracts that would necessarily defeat predominance and, by extension, class certification).
[112] *See id.* at 584; *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 860-861 (6th Cir. 2013).
[113] *See Butler v. Sears, Roebuck & Co.*, 727 F.3d 798 (7th Cir. 2013).

the class into subclasses under Rule 23(c)(5).[114] Although use of Rule 23(c)(5) is less commonly applied by courts, *sua sponte*, courts do frequently consider plaintiffs' motions to certify subclasses,[115] which may result in certifying only those subclasses that are susceptible to predominance on impact and damages.[116]

In summary, despite initial confusion in the immediate wake of *Comcast*, many lower courts anticipated the dangers that a broad reading of the "both impact and damages" proposition would pose to private class action litigation. As a result, circuits have overwhelmingly disregarded this proposition in favor of their pre-*Comcast* approaches. In this sense, Justice Ginsburg's dissent presented lower courts with a roadmap to protect the class action mechanism while following their existing precedent, without directly disputing the majority's holding.

3. The "Standard of Review for Sufficiency of the Evidence" Proposition

The last legal proposition lower courts faced coming out of *Comcast* involved the standard used by courts when reviewing damage models on appeal. Recall from *Comcast* that Justice Scalia implicitly advanced a proposition that whether evidence presented satisfies the Rule 23(b)(3) predominance inquiry is a legal question subject to *de novo* review, rather than a factual question reviewed for "clear error." Unlike the first two propositions discussed *supra*, almost no lower courts have directly cited *Comcast* for this proposition, either to apply or circumvent it.

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[114] *See id.* at 798 (suggesting that if there are large differences in the way different defective washing machines were affected by mold, district judges might create subclasses for each washing machine, rather than impose a barrier to class certification).
[115] *See Geary v. Green Tree Servicing, LLC*, 2017 WL 2608691, at *14 (S.D.Ohio, 2017).
[116] *See In re Processed Egg Prod. Antitrust Litig.*, 312 F.R.D. 171, 202 (E.D. Pa. 2015) (certifying a direct purchaser subclass of shell eggs but denying certification of an egg products subclass for failure to meet predominance).

Appellate courts assert that the standard of review of district courts at the class certification stage is abuse of discretion.[117] Some circuits describe the abuse of discretion standard as a composite of both legal and factual review, where pure issues of law are reviewed *de novo* and fact-dominated issues are reviewed for "clear error."[118] Other courts explain abuse of discretion as a third standard of review[119] for when a district court relies on either clearly erroneous factual findings and incorrect application of legal standards[120] in a way that exceeds the range of permissible decisions.[121] After defining abuse of discretion, many courts decline to explicitly state which part of the standard they are using they are using and to which issue in the case it applies.[122] This muddies the waters, much like Justice Scalia's suggestion that his *Comcast* holding would survive a "clear error" review, as discussed in Part II, *supra*.

Perhaps due to this lack of clarity, very few courts have cited *Comcast* for the proposition that review of the sufficiency of evidence in the Rule 23(b)(3) predominance inquiry is a legal question. In the rare counterexample of *In re Rail Freight Surcharge Antitrust Litig. I*, the D.C. Circuit did cite *Comcast*, quoting Justice Scalia's language that "while the data contained within an econometric model may well be 'questions of fact' in the relevant sense, what those data

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[117] *See, e.g., Neale v. Volvo Cars of N.A., LLC*, 794 F.3d 353, 358 (3d Cir. 2015); *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161 (9th Cir. 2014; *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1253 (10th Cir. 2014).
[118] *See, e.g., In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018); *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir.), *cert. denied sub nom. StarKist Co. v. Olean Wholesale Grocery Coop., Inc., On Behalf of Itself & All Others Similarly Situated*, 214 L. Ed. 2d 233, 143 S. Ct. 424 (2022) ("We review the district court's determination of underlying legal questions de novo . . . and its determination of underlying factual questions for clear error").
[119] *See In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006), *decision clarified on denial of reh'g sub nom. In re Initial Pub. Offering Sec. Litig.*, 483 F.3d 70 (2d Cir. 2007) (explaining by way of a Rule 23(a) numerosity example how appellate courts think about abuse of discretion— reviewing the factual finding regarding the size of the proposed class would be for clear error, the judge's articulation of the legal standard governing numerosity would be *de novo* and the ultimate decision would be for abuse of discretion).
[120] *See, e.g., In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 850 (6th Cir. 2013).
[121] *See, e.g., Roach v. T.L. Cannon Corp.*, 778 F.3d 405 (2d Cir. 2015).
[122] *See Roach v. T.L. Cannon Corp.*, 778 F.3d 405 (2d Cir. 2015) (rejecting the legal standard of separately requiring predominance on impact and damages in such a way to imply a *de novo* review, but not explicitly saying so); *But see, In re Nexium Antitrust Litig.*, 777 F.3d 9, 18 (1st Cir. 2015) (stating the abuse of discretion standard of review, then explicitly saying the court does not find any clear material error, but rejecting class certification indicating a *de novo* standard).

prove is no more a question of fact than what our opinions hold."[123] In rejecting class certification, the D.C. Circuit indicated that its review of plaintiffs' damages model had to be legal, as there were no facts in the record to review for the particular issue being raised on appeal. However, later upon rehearing the case *In re Rail Freight Surcharge Antitrust Litig. II*, the D.C. Circuit opted not to cite *Comcast* and spoke far more deferentially about its review of the district court's model findings. Although this review did not explicitly state if it was *de novo*, the court's deferential approach to affirming the district court's defective model findings would seem to indicate otherwise, if not at least abandonment of the *Comcast* proposition as authority.

At least one other court has directly quoted *Comcast* for its language that what a statistical regression model may prove is not a question of fact, in the Ninth Circuit's recent decision in *Olean Wholesale Grocery Cooperative, Inc.* v. *Bumble Bee Foods LLC*.[124] However, just as in *In re Rail Freight II*, after citing *Comcast* the Ninth Circuit quickly turned to deferentially affirming the lower court's grant of class action, using language that indicated it might be using the "clear error" component of the abuse of discretion standard.

Merely speaking deferentially of the district court's findings does not necessitate that a review is for "clear error," but the lack of explicitness in these opinions does make it difficult to parse between standards. Why did the D.C. Circuit abandon its cite to *Comcast* from *In re Rail Freight I* to *II*? One explanation might be that the posture of the case had flipped—the appellate court was now positioned to affirm the district court's denial of class certification—requiring less judicial authority than its original need in a decision overturning class certification.

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[123] *In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869*, 725 F.3d 244, 255 (D.C. Cir. 2013) (quoting *Comcast*, 569 U.S. at 36 n.5).
[124] *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 663 (9th Cir.), *cert. denied sub nom. StarKist Co. v. Olean Wholesale Grocery Coop., Inc., On Behalf of Itself & All Others Similarly Situated*, 214 L. Ed. 2d 233, 143 S. Ct. 424 (2022) (quoting *Comcast*, 569 U.S. at 36 n.5).

However, given that *Olean Wholesale Grocery* had the opposite posture and the same conclusion, this is improbable. More likely, the D.C. Circuit has simply fallen into line with other circuits in relying on an opaque abuse of discretion standard and declining to rely on *Comcast* for the proposition that a damages model is reviewed as a legal question, *de novo*.

Conclusion

Despite much early consternation about the potential for the *Comcast* decision to heighten and complicate class certification requirements, the last decade shows the decision to have had a relatively small impact in the way lower courts approach the Rule 23(b)(3) predominance inquiry for class certification. Although many lower courts accept the *Comcast* majority's first proposition that damages must stem from the defendants' actions that created the legal liability, it is rarely applied to deny class certification. When courts do deny predominance on damages on *Comcast* grounds it is usually in a domain-specific setting, such as securities litigation. When presented with more complicated defenses to predominance on damages, such as unidentifiably uninjured plaintiffs, courts decline to cite *Comcast*.

More importantly, by coalescing around a narrow reading of *Comcast* that disregards the majority's second proposition—that class certification requires predominance to be met separately with respect to both impact and damages—lower courts have effectively made the decision unremarkable, preserving longstanding traditions of allowing class certification to proceed despite the potential for individual damage calculations trials. *Comcast*'s obscurity is furthered by near universal silence and occasional tepid citation of the proposition that review of a damages model for sufficiency of evidence for predominance under Rule 23(b)(3) is a question of law. Taken together, perhaps what *Comcast* truly stands for is an example of effective

advocacy in dissent, as Justices Ginsburg and Breyer's efforts to limit the decision to "this day and case only" seem to have won out in practice.