

**FROM HYDROGEN PEROXIDE TO COMCAST:
THE NEW RIGOR IN ANTITRUST CLASS ACTIONS**

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Abstract:

In 2009, the Third Circuit decided Hydrogen Peroxide, which announced a more rigorous standard under Federal Rule of Civil Procedure 23(b)(3) for assessing whether a putative class could establish antitrust injury. Earlier this year, the Supreme Court decided Comcast v. Behrand, a case that carries potentially broad implications for both antitrust cases and Rule 23(b)(3) class actions generally. A review of the case law starting with Hydrogen Peroxide and continuing through Comcast and its progeny reveals the new rigor in antitrust class action decisions and suggests what the future may hold, including the type of arguments that may provide defendants the most likely chance of defeating class certification. After Comcast, rigor under 23(b)(3) can no longer be avoided in assessing all class actions questions, and courts should now apply Daubert fully in the class setting concerning both impact and damages. Courts should also closely evaluate plaintiffs' proposed methodologies for proving impact to determine if they apply to each class member. Finally, courts will inevitably have to determine how rigorously to scrutinize experts' damages methodologies and whether Comcast requires or suggests more scrutiny in assessing common evidence for measuring damages.

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I. INTRODUCTION

In the wake of the Third Circuit's 2009 decision in *Hydrogen Peroxide*,¹ numerous circuit and lower courts adopted a more rigorous standard under Federal Rule of Civil Procedure 23(b)(3) for assessing whether a putative class could establish antitrust injury or "impact" through common proof. And, no doubt, that newly found rigor resulted in a number of decisions rejecting class certification in cases where, on the proffered expert evidence, individual issues of proof on impact would likely predominate.² Certainly, however, the cases denying class certification on this basis vary quite a bit in identifying the particular failure of evidence under Rule 23(b)(3), ranging from cases that exclude expert testimony at the class stage under *Daubert*³ to those that, in effect, make findings (for class purposes only) that plaintiffs' proposed common proof of impact did not overcome the individualized issues identified by defendants' expert.

By contrast, on the subject of common proof of the amount of damages, relatively fewer courts—both pre- and post-*Hydrogen Peroxide*—rejected class certification on this basis

¹ *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 (3d Cir. 2008).

² See, e.g., *Reed v. Advocate Health Care*, 268 F.R.D. 573 (N.D. Ill. 2009); *In re Plastics Additives*, 03-CV-2038, 2010 WL 3431837 (E.D. Pa. Aug. 31, 2010); *In re Intel Corp. Microprocessor Antitrust Litig.*, MDL 05-1717 JJF, 2010 WL 8591815 (D. Del. July 28, 2010). See also Martin J. Thompson (Moderator), Robert E. Bloch and Margaret E. Guerin-Calvert, *Anatomy of an Information Exchange Healthcare Antitrust Case*, AHLA Seminar Papers, Volume 2010, Issue 1 Antitrust in Healthcare Conference, May 24 2010 (“In our view, *Hydrogen Peroxide* has done for class certification what *Twombly* and *Iqbal* did for the pleading standards plaintiffs must satisfy when faced with a motion to dismiss, and what *Daubert* did with respect to the standards for evaluating expert evidence.”).

³ *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

alone although some did where the proffered methodology clearly could not identify and measure a class member's damage.⁴ The pervasive theme of many 23(b)(3) damages opinions is that, in contrast to the essential element of antitrust impact, plaintiffs and their experts had more flexibility in showing how damages would be assessed through common proof, just as in an individual case where proof of the "amount" of damages historically is given more leeway.⁵

Then, this past year, the Supreme Court decided *Comcast Corp. v. Behrend*, a Rule 23(b)(3) damages case.⁶ Read narrowly, *Comcast* merely stands for the proposition that any proposed common proof of damages under Rule 23(b)(3) must flow solely from the basis of antitrust liability accepted by the court considering class certification. But the Court's majority opinion has much broader implications both in antitrust cases and in Rule 23(b)(3) actions generally. The opinion itself highlights that the same "rigor" the Supreme Court had earlier found applied to Rule 23(a) also applied to Rule 23(b)(3), including presumably for assessing theories and evidence of damages. And while the dissent in *Comcast* did what it could to fence in the implications of the majority opinion—attempting to limit it to its holding on the causal link between the basis for liability and damages—the Supreme Court itself has remanded cases

⁴ See, e.g., *Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 215 F.R.D. 523 (E.D. Tex. 2003), *aff'd*, 100 F. App'x 296 (5th Cir. 2004).

⁵ In *Story Parchment*, for example, the Court recognized that "although damages may not be determined by mere speculation or guess," the damage calculations need not be exact. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931). Instead, evidence that supports a "just and reasonable inference" will be accepted even if the result is "only approximate." *Id.*; see also *Olden v. LaFarge Corp.*, 383 F.3d 495, 508 (6th Cir. 2004) (affirming class certification where liability could be determined as to the entire class but individual issues surfaced during the determination of damages).

⁶ *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

addressing broader impact and damages issues in light of *Comcast*.⁷ Similarly, several cases and commentators have read *Comcast* to require the same rigor now being applied on impact to be applied in the damages setting, whether on the subject of disaggregation, damages methodologies or simply whether plaintiffs met their burden of proving that common issues of proof concerning damages would predominate over any individual issues of proof.⁸

In contrast to most disclaimers for articles such as these, the objective here *is* to be reasonably comprehensive in collecting, assessing and categorizing successful challenges to putative Rule 23(b)(3) direct purchaser antitrust classes since *Hydrogen Peroxide* and in the wake of *Comcast*. Moreover, the goal not only is to understand what "rigor" has come to mean in antitrust cases—both for experts and plaintiffs generally—but also to suggest what the future may hold given the principles and trajectory we see. For example, one need only read *Comcast* and the cases in its wake (including those caught midstream) to see that as a practical matter, *Daubert* could play an increasingly important role at the class certification stage—(e.g., practitioners are going to have to make more *Daubert* (or later, *in limine*) motions to avoid waiver issues). In turn, and given the rigor now clearly mandated by the Supreme Court under Rule 23(b)(3), a body of *Daubert* class action law will continue to expand as it has already since *Hydrogen Peroxide*. And, of course, courts will continue to hone analytical frameworks and principles for assessing Rule 23(b)(3) issues—including those related to damages—to the benefit of both experts and practitioners who must continually adapt to the new rigor.

In this evolving legal environment, the body of Rule 23(b)(3) antitrust decisions themselves suggest some clear demarcations of where decisions have come out in the past and

⁷ See *infra* Section IV.B.1(a).

⁸ *Id.*

where they are likely to come out in the future. The rigor we see from *Hydrogen Peroxide* through *Comcast* and beyond suggests a more step-wise analytical framework for assessing class certification under Rule 23(b)(3) beginning with *Daubert* issues, proceeding to questions surrounding issues of common proof of impact, and finally, if necessary, concluding with a rigorous an analysis of proffered class-wide proof concerning damages. In the pages that follow, we seek both to the types of challenges to class certification that defendants should consider making going forward and to suggest where the future analytical framework for assessing class certification may eventually settle.

I. RIGOR UNDER 23(B)(3) CAN NO LONGER BE AVOIDED

The underlying theme of *Comcast* is that the same (if not more) rigor applied to Rule 23(a) must now apply to Rule 23(b)(3) analysis. Hence, the Court confirmed that at the class certification stage, lower courts must "probe behind the pleadings" even if arguments "would be pertinent to the merits determination," including with respect to expert testimony.⁹ Going forward, this definitively precludes any courts from essentially "kicking the can down the road" to avoid addressing "merits" issues at the class stage. Moreover, it in effect confirms that some of the "short cuts" or presumptions utilized in past Rule 23(b)(3) cases—e.g., based on *Bogosian*¹⁰—will no longer have traction with courts to the extent they were not already limited by *Hydrogen Peroxide* and other cases.¹¹ These or similar truncated analyses cannot meet the Court's directive that lower courts have a "duty to take a 'close look' at whether common

⁹ See *Comcast*, 133 S. Ct. at 1432.

¹⁰ See *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 454 (3d Cir. 1977).

¹¹ See *id.* at 1433.

questions predominate over individual ones."¹² Certainly this is now the state of the law in assessing "predominance" with respect to the subject of "impact."

But, as we describe below, there remains some ambiguity on the scope of rigor that now is to be applied to proof of damages, which courts already are addressing in the post-*Comcast* environment. The weight of that authority, and we believe the better view, is that the rigor required under Rule 23(b)(3) on the essential element of impact does not simply dissolve when assessing plaintiffs' proffered expert evidence for calculating damages. Presumably a settled view will emerge, but one cannot rule out another Rule 23(b)(3) case making its way to the Court and perhaps another opportunity for a divided court to limit the scope of class actions damages litigation.

II. STEP 1: APPLY *DAUBERT* FULLY IN THE CLASS SETTING ON THE QUESTIONS OF BOTH IMPACT AND DAMAGES

A. Where The Class Action Law On *Daubert* Has Been and Is Headed

In the wake of *Comcast*, the subject of *Daubert's* application at the class certification stage will be a primary focus, for two different reasons. First, as a purely practical matter, the waiver risks of *not* making a *Daubert* motion at the class stage are now sufficiently high that we are likely to see a steady flow of such motions in all but the most mundane price fixing cases. Second, now that both *Comcast* (implicitly) and *Dukes* (more directly) have endorsed the use of *Daubert* scrutiny at the class certification stage,¹³ it is reasonable to conclude

¹² *Id.* at 1432 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615, 617 (1997)).

¹³ In *Comcast*, the Court held that respondents could not bring a *Daubert* challenge to expert testimony after the class certification hearing occurred. By refusing to allow respondents to do so, the Court hinted that parties must raise, and courts must consider, *Daubert* issues at the class certification stage. Although *Dukes* also did not hold that trial courts must apply *Daubert* scrutiny at the class certification stage, the Court suggested it much more explicitly than it did in
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that those decisions requiring or endorsing a "full" *Daubert* screen *prior* to ruling on class certification are likely to emerge as the prevailing standard. When *Daubert* testimony goes to Rule 23(b)(3) requirements, to defer a *Daubert* screen until after class certification would effectively remove, or at least severely diminish, the impact of the rigor requirement. This would ensure exactly the kind of provisional, wait-and-see approach that the rigorous approach to class certification rejects. Indeed, it makes little sense to claim rigor is required at the class certification stage but then push off tough (or even easy) *Daubert* calls for some later procedure in the case.

While *Dukes* suggests that *Daubert* scrutiny applies at the class certification stage, other courts have held so more explicitly. This was precisely the reasoning employed by the Seventh Circuit in *American Honda Motor Co. v. Allen*, a case decided before *Dukes* and *Comcast*.¹⁴ There, purchasers of Honda motorcycles brought suit, alleging a design defect that prevented the front steering assembly from wobbling while riding.¹⁵ In support of its class certification motion, plaintiff's expert presented a report that relied on a standard created by the expert himself.¹⁶ Although the District Court acknowledged it had reservations about the reliability of the expert's standard, it refused to exclude the report and instead certified two

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Comcast: "The parties dispute whether Bielby's testimony even met the standards for admission of expert testimony... The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that this is so, but even if properly considered, Bielby's testimony does nothing to advance respondent's case." *Wal-Mart Stores, Inc. v. Dukes*, 113 S. Ct. 2541, 2553-54 (2011).

¹⁴ 600 F.3d 813 (7th Cir. 2010).

¹⁵ *Id.* at 814.

¹⁶ *Id.* at 816.

classes of motorcycle purchasers.¹⁷ The Seventh Circuit reversed, holding that the district court should have performed a full *Daubert* analysis before certifying the two classes.¹⁸ The Seventh Circuit reasoned that if an expert's information is relevant to proving any of the Rule 23 requirements for class certification, then the district court must resolve any challenge to the reliability of that information.¹⁹

A year later, but also before *Dukes* and *Comcast*, the Eleventh Circuit followed suit in *Sher v. Raytheon Co.*²⁰ Relying on *American Honda*, the court overturned a district court's certification of a class, holding that the district court's failure to apply *Daubert* during its Rule 23 analysis was clear error.²¹ And, of course, the Supreme Court originally granted *certiorari* in *Comcast* for purposes of addressing the role of *Daubert* at the class certification stage before concluding that defendants had waived their rights by failing to file a motion objecting to the plaintiffs' expert report.²²

Accordingly, we are likely to see the maturing of a clear body of class certification law that is centered around traditional *Daubert* factors, but plays out in the landscape and language of class certification. Moreover, even past decisions that chose not to apply *Daubert* fully (or at all), yet clearly highlighted standard *Daubert*-like flaws in the expert's

¹⁷ *Id.* at 816-17.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 419 F. App'x 887 (11th Cir. 2011).

²¹ *Id.* at 890.

²² *Comcast*, 133 S. Ct. 1426, 1431 n.4.

qualifications or analyses, are a good resource for assessing the type of class-related *Daubert* exclusions we are likely to see going forward. These and other candidates are described below.

B. Types of Rule 23(b)(3) Expert Analysis That Should Not Make It Past A *Daubert* Screen

With rare exception, class action experts in the antitrust field are "qualified" in terms of their academic backgrounds and professional experience. In fact, there is a fairly robust cadre of antitrust economists that tend to work on the plaintiffs' side of the bar and, in turn, have their work scrutinized in a number of court opinions. Instead, the problem for many of these economists is that their professional experience in the class action setting often is based largely on the pre-rigor legal framework. In the earlier framework, the validity of allegations was assumed, and courts did not address issues that went to the "merits" until after class certification. Under this framework, at times the mere assurance that a methodology based on common proof existed or could be developed at some later point in the litigation was enough to support class certification.²³

- 1. Those days are now officially behind us. Indeed, class experts must now be prepared to defend their work from any number of *Daubert* perspectives, all of which should be pressed by defendants.²⁴ Where**

²³ This was precisely the result in *In re Lineboard Antitrust Litigation*, a 2002 case decided by the Third Circuit before *Hydrogen Peroxide*. *In re Lineboard Antitrust Litig.* 305 F.3d 145, 154-55 (3d Cir. 2002). There, the plaintiffs' expert assured the court that she could rely on several accepted statistical or mathematical approaches to prove harm, including benchmarking, the yardstick approach, and simply comparing prices during the conspiracy period to prices during the non-conspiracy period. *Id.* Accepting the expert's methods at face value—methods that have been rejected by courts after *Hydrogen Peroxide*—the court held that plaintiffs eventually could establish injury on a class-wide basis. *Id.* at 155.

²⁴ There are indications that, at least in the past, an unsuccessful *Daubert* challenge at the class certification stage can reduce the likelihood of successfully challenging that expert at a later phase. Accordingly, there might be some instances where a *Daubert* challenge at the class

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**The Theory of Impact Does Not Match The Theory
of Antitrust Injury**

One predictable *Daubert* motion in light of *Comcast* is one arguing that the expert has proffered a theory or analysis of impact or damages that does not clearly limit the harm to the exact basis of antitrust liability.

In *Comcast*, cable television customers brought an antitrust action against Comcast and its subsidiaries, alleging that Comcast's practice of "clustering" resulted in Comcast monopolizing the Philadelphia market. The District Court and Court of Appeals both approved certification of the class under Rule 23(b)(3). The Supreme Court reversed, holding that class certification was improper because the damages model developed by plaintiffs' expert did not prove that damages could be measured on a class wide basis. Consequently, because individual questions would overwhelm the Court's damages analysis, it held that plaintiffs did not satisfy Rule 23(b)(3)'s predominance requirement.

The case arose out of a Comcast practice called "clustering," a business strategy intended to concentrate operations within a particular region. In order to implement its strategy, Comcast purchased competing cable providers in the Philadelphia cluster²⁵ and then replaced those providers with Comcast services. As a result of the practice, Comcast's share of subscribers in the region allegedly jumped from 23.9% in 1998 to 69.5% in 2007.

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certification stage could be counterproductive for defendants. *See* Langenfeld and Alexander, etc.

²⁵ The "Philadelphia cluster," the relevant cluster in *Comcast*, was made up of 16 counties located in Pennsylvania, Delaware, and New Jersey. *Comcast*, 133 S.Ct. at 1430.

Plaintiffs presented four theories of antitrust injury that allegedly affected the entire class.²⁶ The district court rejected all but the "overbuilder deterrence theory," which posited that Comcast's strategy reduced competition by deterring "overbuilders"—companies that chose to build competing networks in areas where an incumbent cable company already operates. But plaintiffs' damages model was prepared before the court's ruling regarding which liability theories were viable and hence considered all four theories.²⁷ The Supreme Court thus had to consider whether, when calculating damages, the plaintiff could use a model that measured harm based on the original four theories of injury or instead had to use a model based only on the remaining theory of overbuilder deterrence.

The Court held that plaintiffs' model could not meet the predominance requirement of Rule 23(b)(3). Plaintiffs were required to put forth a damages model that was specific to the overbuilder theory in order to sustain the predominance standard. Instead, plaintiffs' model calculated damages based on the harm caused by "the alleged anticompetitive conduct as a whole" rather than the harm caused solely by overbuilder deterrence. This model could not differentiate between higher prices in general and higher prices attributable to overbuilder deterrence. Based on this flawed methodology, customers who were harmed by effects other than overbuilder deterrence still would be awarded damages. As a result, the trial court would have to investigate whether overbuilder deterrence or entirely different effects were

²⁶ The four theories were that (1) clustering acquisitions prevented or made it difficult for customers to compare prices; (2) direct broadcast satellite companies, one set of potential competitors, found it more difficult to gain rights to local sports content and decided not to enter the Philadelphia market as a result; (3) Comcast's ability to obtain programming material at lower prices allowed it to raise prices; and (4) the "overbuilder deterrence theory" discussed above. *Comcast*, 133 S.Ct. at 1439.

²⁷ In short, the model presented by plaintiff's expert created a "but for" baseline price—a price the market would have settled on absent the effects of all four alleged theories of liability.

the true cause of individual class members' harm. Recognizing this, the Court found that individual questions necessarily would predominate over common questions during the damages inquiry, requiring reversal. As anticipated, since *Comcast* a number of courts have applied this fundamental principle in either rejecting class certification or having to reassess class certification in light of *Comcast*.²⁸

The practical implications of *Comcast*—just on the subject of disaggregation—are far reaching and potentially very complicated in cases where there are a variety of alleged misconduct. Experts are likely to find themselves offering several (or a myriad of) alternative impact and damages scenarios depending on the nature of the allegations. Moreover, the fact that, under Rule 23, class certification is supposed to be addressed early in a case²⁹ puts plaintiffs (and courts having to manage the case) in somewhat of an awkward position: class experts have to account for alternative or completely different bases for antitrust liability often before discovery is over and plaintiffs themselves have settled on their preferred theory of liability. And, on top of this, all of these positions must be taken under a much more rigorous certification standard in light of *Comcast*.

Finally, there also are disaggregation and causation issues that likely will come into play that go beyond the alternative bases for liability. Courts have long struggled with how to address the subjects of causation, impact and damages where plaintiffs' harm flows in part

²⁸ See *infra* Section IV.B.1.

²⁹ Federal Rule of Civil Procedure 23(c)(1)(A) ("*Time to Issue*. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action."). See also *Hydrogen Peroxide*, 552 F.3d 305, 318 (3d Cir. 2008) (discussing 2003 Amendments to Rule 23(c)(1)(A) and their implications for the timing of class certification).

from lawful or procompetitive conduct.³⁰ Accordingly, class experts not only will have to deal with alternative analysis of alleged misconduct, courts (and defendants) are likely to consider whether economic experts can offer common proof of impact and damages that properly disaggregate other causes of plaintiffs' harm, irrespective of whether it is other alleged misconduct. Moreover, the dissent in *Comcast* was quite upset that the majority opinion strongly suggests that plaintiffs and their experts must prove precisely "how" the alleged antitrust misconduct actually resulted in higher prices. The dissent argued that it should be sufficient simply to show "that" prices were in fact higher in the geographic market where Comcast had accumulated a high share.³¹ While these issues are beyond the scope of this article, they surely will be explored further in the lower courts.

2. Where The Methodology Cannot Pass The Most Basic Daubert Academic Requirements

Perhaps the easiest application of *Daubert* in the class setting is where plaintiffs' expert essentially makes up his or her own analysis for the case—i.e., where the expert is not relying on an academically-established methodology. It is not uncommon for experts to rely on theories uniquely developed within a case and not based on an established methodology, and these situations often warrant a *Daubert* challenge.

For example, in *American Honda*, plaintiffs' expert created a report attempting to analyze the oscillations of Honda motorcycles' steering columns.³² The report's analysis rested on the application of a "wobble decay" standard, which was created by plaintiffs' expert

³⁰ Compare M. Sean Royall, *Disaggregation of Antitrust Damages*, 65 Antitrust L.J. 311 (1997) with *Conwood Co., L.P. v. U.S. Tobacco Co.*, 209 F.3d 768 (6th Cir. 2002).

³¹ See *Comcast*, 133 S. Ct. at 1440-41.

³² *American Honda Motor Co. v. Allen*, 600 F.3d 813, 818 (7th Cir. 2010).

himself.³³ The Seventh Circuit excluded the report under *Daubert* for three reasons. First, there was no indication that the standard used in the report had been generally accepted by anyone other than plaintiffs' expert.³⁴ Second, plaintiffs' expert had no baseline to which he could compare his findings.³⁵ Third, the expert's methodology was flawed because it relied on an impermissibly small sample size.³⁶ All of these reasons, the court found, indicated that the report did not pass the most basic *Daubert* testing requirements.³⁷

3. Where The Methodology "Presumes" or "Assumes" Impact or a Basis For Calculating Damages

Another common flaw—though experts now are acutely aware of the pitfall—is to offer a methodology that simply ignores the key question: is there common proof that could be used at trial to establish that the alleged misconduct in fact caused injury to each class member. Proposed expert testimony that avoids this central issue will not survive.

³³ *Id.*

³⁴ Despite the expert's report being published in a journal for forensic engineers who testify as motorcycle experts, there is no indication that the standard itself was accepted by anyone other than the expert. In addition, the published article acknowledged there was no standard articulated by the government, the industry, or the Society of Automotive Engineers that determined acceptable response characteristics for motorcycles once they go into "wobble mode."

³⁵ Plaintiff's expert had never conducted any "rider confidence studies" to determine when or how motorcycle riders perceive wobble nor did he perform a test to determine the minimum wobble amplitude at which a rider would detect oscillation.

³⁶ The expert's study relied on a test of a single motorcycle ridden by a single test rider and then extrapolated those findings to an entire fleet of motorcycles produced from 2001 to 2008.

³⁷ *Id.* at 818-19.

For example, in *Blades v. Monsanto Co.*,³⁸ purchasers of Monsanto's genetically modified seeds alleged that Monsanto conspired with competitors to inflate the price of their seeds. Plaintiffs moved to certify two classes under Rule 23, but the district court rejected certification of both classes. The Eighth Circuit affirmed the district court's decision and held that any attempt to analyze the harm caused by the conspiracy would require consideration of individual rather than common questions.³⁹

After describing the nationwide prices of genetically modified seeds, the court concluded that plaintiffs' expert mistakenly assumed a class-wide injury. Rather than rely on this assumption at the class certification stage, the court required plaintiffs' expert to establish defendants' alleged antitrust violations on a class-wide basis through common proof. However, because the supply-and-demand conditions for the seeds varied so greatly, seed prices fluctuated within individual geographic markets across the country. Moreover, sellers throughout the country utilized heavy and variable discount approaches, which resulted in sellers charging a variety of prices for the seeds. In light of such differences in seed pricing, the court found that plaintiffs could not, through common proof, prove that each class member suffered injury by paying an inflated price for the seeds. In other words, when assessing whether each class member was harmed, the court would have to answer too many individual questions about which farmers were injured due to inflated prices and how significantly they were injured. As such, both groups of plaintiff seed purchasers failed to satisfy Rule 23's predominance requirement and could not be certified as a class.⁴⁰

³⁸ 400 F.3d 562 (8th Cir. 2005).

³⁹ *Id.* at 569-70.

⁴⁰ *See id.* at 569-71.

4. Other Analyses That "Mask" Potential Individual Questions of Proof

Separate and apart from these rather obvious defects, a rigorous approach to Rule 23(b)(3) will increasingly compel courts to reject expert methodologies and analyses that tend to avoid or mask potential individualized issues of impact or damages. Below are a few of the primary examples.

(a) "Pricing Structure" or "Correlation Analysis"

In vogue for some time was the so-called "pricing structure" analysis—i.e., the notion that if prices of differentiated products move together in response to marketplace factors, then a price fixing agreement also would affect all class members in a similar fashion.⁴¹ Such a structural approach, however, is ripe for masking individual issues of proof.⁴² For example, in *In re Plastics Additives Antitrust Litigation*,⁴³ all direct purchasers of organotin heat stabilizers ("tins") and epoxidized soybean oil ("ESBO") alleged that defendant producers conspired to fix prices. Plaintiffs moved to certify two classes, one comprised of tin purchasers and the other comprised of ESBO purchasers. The plaintiffs' expert opined that pricing for the relevant products displayed a "structure" in which prices "moved similarly" over time, such that if a conspiracy existed, it would have impacted every purchaser.⁴⁴ After plotting transaction data on

⁴¹ See *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 535 (6th Cir. 2008) ("Thus, even when there are individual variations in damages, the requirements of Rule 23(b)(3) are satisfied if the plaintiffs can establish that defendants conspired to interfere with the free-market pricing structure.").

⁴² *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 313 (3d Cir. 2008) (rejecting this type of simplistic analysis of market pricing).

⁴³ No. 03-CV-2038, 2010 WL 3431837 (E.D. Pa. Aug. 31, 2010).

⁴⁴ *Id.* at *13.

a graph, the expert relied on "visual observation" as the sole proof that prices were moving similarly.⁴⁵

The court rejected the pricing structure methodology for three reasons. First, as a preliminary matter, some of the graphs presented did not, on their face, show that prices moved similarly throughout the class period.⁴⁶ Second, the graphs relied on did not include transactional data for all customers and all products. Instead, the graphs considered a very limited sample size: 18 of the 256 tin products at issue, less than two dozen of the 508 tin class members, and less than two dozen of the 503 ESBO class members.⁴⁷ Third, evidence at trial showed that, at certain times during the class period, prices moved in opposite directions.⁴⁸ Thus, the court found that the pricing structure model was inadequate to measure antitrust injury on a class-wide basis.

Similarly, in *In re Florida Cement & Concrete Antitrust Litigation*, the court rejected the plaintiffs' expert's correlation analysis as an insufficient basis for showing common proof of impact.⁴⁹ The court focused on the lack of connection between general pricing structure in the market and the impact of a price fixing conspiracy, noting that "[p]laintiffs do not explain how the mere fact that average prices move similarly over time in response to general changes in market conditions necessarily implies those prices will also respond similarly to a price-fixing

⁴⁵ *Id.*

⁴⁶ *Id.* at *14.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ No. 09-23187-CIV, 2012 WL 27668 (S.D. Fla. Jan. 3, 2012).

scheme such as the one alleged here."⁵⁰ As the court noted, "[t]he implementation of a price-fixing scheme may involve different considerations besides changes in market conditions."⁵¹

Economists similarly have rejected a correlation analysis as an adequate way to determine whether antitrust impact exists.⁵² As two commentators note, "[t]he conclusion that the 'prices move together' is entirely in the eye of the beholder, and this subjectivity is exactly what makes this 'analysis' non-scientific."⁵³

(b) Methodologies Based on "Average" Impact

While regression analysis can be a valuable tool in determining whether common proof of impact exists, a common fatal flaw in plaintiffs' experts' regression models is a reliance on averages or average pricing.

As the Northern District of Illinois recently explained, quoting an ABA publication:

Sometimes the prices used by economists are averages of a number of different prices charged to different customers or for somewhat different products. Using such averages can lead to serious analytical problems. For example, averages can hide substantial variation across individual cases, which may be key to determining whether there is a common impact. In addition, average prices may combine the prices of different package sizes of the same product or of somewhat different products. When this happens, the

⁵⁰ *Id.* at *10.

⁵¹ *Id.*

⁵² See, e.g., Michelle M. Burtis & Darwin V. Neher, *Correlation and Regression Analysis in Antitrust Class Certification*, 77 *Antitrust L.J.* 495, 511-12 (2011).

⁵³ John H. Johnson & Gregory K. Leonard, *In the Eye of the Beholder: Price Structure as Junk Science in Antitrust Class Certification Proceedings*, 22 *Antitrust* 108, 111 (2008); see also Franklin M. Fisher, *Statisticians, Econometricians, and Adversary Proceedings*, 81 *J. Am. Stat. Ass'n* 277, 282-85 (1986) (describing correlation analysis as "pseudoscience" and "poor statistical and econometric testimony masquerading as serious science").

average price paid by a customer can change when the mix of products that the customer buys changes – even if the price of [no] single product changed.⁵⁴

Hence, the problem is that an "average" impact, by definition, fails to demonstrate that all class members have been impacted—whether in a Section 1 or a Section 2 Sherman Act case.

In *Bell Atlantic Corp. v. AT&T Corp.*, for example, plaintiffs alleged that AT&T attempted to monopolize the market for caller ID services by blocking the free transmission of caller ID signals over its long-distance network.⁵⁵ Plaintiffs moved to certify two classes, one comprised of businesses and organizations that purchased AT&T's long distance service and a second comprised of business and organizations that were actual or potential purchasers of caller-ID services for long distance calls.⁵⁶ Because of AT&T's actions, plaintiffs alleged they were unable to enjoy the substantial efficiency gains and cost savings that come with caller ID.⁵⁷ Plaintiffs' proposed damages formula utilized two national averages: the average cost of labor and the average amount of time that class members would have saved per call had caller ID been

⁵⁴ *Reed v. Advocate Health Care*, 268 F.R.D. 573, 591 (N.D. Ill. 2009) (quoting ABA Section of Antitrust Law, *Econometrics: Legal, Practical, and Technical Issues* 220 (2005)); *see also In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 493 (N.D. Cal. 2008) (hereinafter "*In re GPU*") (rejecting "correlation analyses" based on averages rather than specific "prices paid by individual consumers" and finding that plaintiffs' expert "evaded the very burden that he was supposed to shoulder"); Eric F. Forister & Samid Hussain, *Empirical Approaches in Assessing Class Certification in Direct Purchaser Price-Fixing Cases*, *The Antitrust Review of the Americas*, 2010 at 22 ("Because not all prices exactly follow the trend of the 'average' price, this aggregation or pooling of data precludes one from determining ways in which individual price series are related and how the alleged price-fixing agreement would affect different prices.").

⁵⁵ 339 F.3d 294 (5th Cir. 2003).

⁵⁶ *Id.* at 299-300.

⁵⁷ *Id.* at 300. According to plaintiffs, the business benefits of caller ID are: screening out unwanted calls (and thereby reducing long-distance expenses), returning calls hours later (even in cases where the caller does not leave a message), tracking call volume (because some units can record information for later recall), and faster and more efficient customer service.

available.⁵⁸ Using these averages as a baseline, plaintiffs argued, the court could assess the class members' harm by taking the difference between plaintiffs' averages and the national averages.⁵⁹

The Fifth Circuit denied class certification, finding that plaintiffs did not satisfy Rule 23(b)(3)'s predominance requirement because their method to prove harm could not reasonably estimate the harm suffered by every class member.⁶⁰ The court found that in order to adequately gauge harm, it had to consider important individualized questions like the varied nature of the businesses that made up the classes and, depending on those business, the range of uses for which caller ID could be employed.⁶¹ Because plaintiffs' averaging formula failed to account for such critical and individualized factors, plaintiffs' measure of harm—and eventual damages projections—could not be applied universally to all the businesses in the proposed classes.⁶² Consequently, the court held that individual questions rather than common questions dominated both the antitrust injury and damages inquiry.⁶³

Similarly, in *Reed v. Advocate Health Care*, plaintiffs alleged that entities controlling several hospitals in the Chicago area conspired to suppress the wages of their registered nurse ("RN") employees.⁶⁴ To prove the conspiracy impacted all class members, plaintiff's expert proffered econometric models referred to as "wedge" analyses, which compare the actual wages paid by defendants to the wages defendants would have been willing to pay

⁵⁸ *Id.* at 300.

⁵⁹ *Id.*

⁶⁰ *Id.* at 307.

⁶¹ *Id.* at 306, 307.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Reed v. Advocate Health Care*, 268 F.R.D. 573, 577-78 (N.D. Ill. 2009).

given the actual supply of nursing hours.⁶⁵ Calling plaintiffs' expert's statements "vague and inscrutable," the court rejected the wedge analysis.⁶⁶

The court found many problems with the wedge analysis, one of which was averaging.⁶⁷ While the average wage may have been reduced from the alleged conspiracy, it does not follow that each class member's wage was actually reduced as a result of the conspiracy.⁶⁸ Conversely, because the evidence showed a substantial variation in the compensation of individual RNs during the class period, the court found that some members of the class were treated differently than others and thus not affected by the alleged conspiracy.⁶⁹ In addition, the wedge analysis made no attempt to distinguish between registry nurses and non-registry nurses despite the fact that registry nurses made up 20% of the class and that registry nurses' base wages are calculated differently.⁷⁰ The failure to account for such a disparity, the court found, rendered the model utterly unable to show common impact on a class-wide basis. While the court did not exclude the evidence on the grounds that it failed under *Daubert*, it held that because the method failed to provide a reliable basis for plaintiffs to show common impact, it need not decide whether the wedge analysis passed muster under *Daubert*.⁷¹ In light of *Comcast*, future courts are much more likely to grant the *Daubert* motion in these circumstances and reserve on *Daubert* only where it is a much closer call.

⁶⁵ *See id.* at 582-84.

⁶⁶ *Id.* at 589.

⁶⁷ *Id.* at 591.

⁶⁸ *Id.* at 592.

⁶⁹ *Id.*

⁷⁰ *Id.* at 593.

⁷¹ *Id.* at 594.

These principles apply with equal force outside of the price-fixing content. For example, in *In re Wholesale Grocery Products Antitrust Litigation*, the plaintiffs alleged that two large grocery wholesalers conspired to allocate territories and customers using an Asset Exchange Agreement (“AEA”). *In re Wholesale Grocery Prod. Antitrust Litig.*, No. 09–MD–2090 ADM/AJB, 2012 WL 3031085 (D. Minn. July 25, 2012). The plaintiffs presented several theories of common proof that could be used to show impact, including price lists and two methodologies used by their expert: contrary hypothesis theory and a variance test. The court rejected these methodologies as insufficient to show damages on a class wide basis because they improperly relied on averages and oversimplified the individual plaintiffs’ price negotiations. Specifically, the court rejected the contrary hypothesis theory because it could not confirm that each class member was impacted:

Here, the contrary hypothesis test does not address the price levels after the AEA and whether each member of the New England Class was in fact charged a supra-competitive price. If accepted as valid, the contrary hypothesis test proves that SuperValu’s presence in New England influenced C & S’s prices throughout that region. However, even accepting that premise, the contrary hypothesis shows nothing about prices for C & S customers after the AEA (and in fact does not analyze upcharges after the AEA at all).

Id. at *10. The court similarly rejected the variance test, which “is a statistical measure of the spread of data calculated by comparing each data point’s value with the average value of the data set.” *Id.* The court found that this methodology “only compares averages.” *Id.* at *13.

However, “[t]hat profits may have increased on average, does not mean that monopolist profits were extracted from each class member.” *Id.* Rather than accept these theories that *assumed* all class members were impacted in the same way, the court focused on the fact that “prices are all the result of individual negotiations [...] influene[d by, among other factors,] the size of orders, frequency of orders, and transportation costs.” *Id.* at *10. Accordingly, the court denied class

certification. Again, the court did not conduct a *Daubert* analysis, but after *Comcast*, courts will be much more likely to exclude expert testimony under *Daubert* where it erroneously relies on averages and oversimplified information that is not consistent with the anticompetitive theory of the case.

(c) **Methodologies That Ignore Critical Variables and Issues with the But-For World**

Finally, courts will continue to be presented with methodologies that, in theory, could pass *Daubert*, but remain flawed in the face of facts highlighted by the defendants that affect the price paid by individual putative class members. For example, regression models that ignore significant potentially individualized variables have been held to be an inadequate form of common proof. While these factors often exist in price fixing cases, they are just as likely to appear in vertical non-price restraint cases or monopolization cases where prices are negotiated on an individualized basis.

For example, in *In re Live Concert Antitrust Litigation*, plaintiffs' expert presented four types of statistical analyses, one of which was called the "yardstick approach."⁷² At the first step of the "yardstick approach," plaintiffs' expert calculated the average ticket price for rock concerts in each geographic market. He then calculated the average ticket price for concerts promoted by the defendants in those markets and compared the two average prices. Finding that the concerts promoted by defendant had a higher average ticket price, the expert concluded that: (1) the average higher price was a direct result of the alleged conspiracy and (2) all class members were injured because they paid the higher price.⁷³

⁷² 863 F. Supp. 2d 966, 972 (C.D. Cal. 2012).

⁷³ *See id.* at 974.

The court flatly rejected this method, finding that the "yardstick" comparison ignored other critical factors that determine average ticket prices. Because the yardstick method did not account for other possible explanations for the difference in average ticket prices, including artist quality, popularity, and venue size, it could not properly estimate impact in the but-for world, and the court excluded the evidence generated from the "yardstick" method.⁷⁴

Similarly, in *In re Cox Enterprises, Inc. Set-Top Cable Television Box Antitrust Litigation*, plaintiffs alleged that defendant illegally forced its customers to rent a Cox set-top box in order to gain full access to defendant's premium cable services.⁷⁵ As a result of defendant's alleged tying scheme, plaintiffs claimed they paid supracompetitive prices for the tied product, the set-top box. In order to prove that all class members actually were injured by paying the supracompetitive price, plaintiffs' expert proposed the "GRS test."⁷⁶ The GRS test estimated the overcharged price by comparing the actual price paid by Cox customers to the "but for" price—the price Cox customers would have paid absent the alleged conduct. The proposed damages would be calculated by multiplying the overcharge price by the number of set-top boxes rented. Although the court refused to decide whether the GRS test satisfied *Daubert*,⁷⁷ it considered the *Daubert* requirements when evaluating whether the GRS test could be applied to the entire plaintiff class.⁷⁸

⁷⁴ *Id.* at 975.

⁷⁵ No. 09-ML-2048-C, 2011 WL 6826813 at *1 (W.D. Okla. Dec. 28, 2011).

⁷⁶ *Id.* at *13.

⁷⁷ *Id.* at *15. The court acknowledged that the test was "promulgated by serious economists who are experts in their field, peer reviewed, published and discussed in economic literature, and previously used in other litigation." Thus, the court determined that whether the GRS test passes *Daubert* muster "is not easily resolved." *Id.*

⁷⁸ *Id.*

The court particularly found flawed the test's factor that weighed demand elasticities, faulting the expert for relying on academic estimates that were not Cox-specific to calculate demand elasticities. The court found that in order to estimate demand elasticities, an expert must consider the extent of market competition. And because market competition varies in different parts of the country, the court held that it was for plaintiffs' expert to rely on common market data contained in the academic estimates. Thus, because the GRS test could not estimate demand elasticities unless it considered individualized market data, which it did not do in this case, the court denied certification.⁷⁹

Going forward, courts are likely to apply the rigor required under Rule 23(b)(3) to regression models (or other quantitative analyses) that ignore obvious market facts or variables affecting price that, if addressed, may show a lack of impact to some number of class members. And where such potential is evident on the record, courts are very likely to exclude the expert's opinion based on a threshold *Daubert* review without ever reaching the full review of the record that is required where an expert's testimony is not facially defective.

III. STEP 2: EVALUATE IF THE PROPOSED METHODOLOGY FOR PROVING IMPACT BE USED BY EVERY CLASS MEMBER IF APPLIED IN INDIVIDUAL CASES

Where a plaintiff's class action expert survives a *Daubert* challenge, this by no means suggests that class certification is inevitable or easy. Instead, survival of a *Daubert* motion is a necessary, but not in and of itself sufficient, condition for class certification.⁸⁰ In

⁷⁹ *See id.* at *15-16.

⁸⁰ *See, e.g., Blades v. Monsanto Co.*, 400 F.3d 562, 569 (8th Cir. 2005) (deferring ruling on *Daubert* motion in order to consider Plaintiffs' arguments on class certification); *Bacon v. Honda of Am. Mfg., Inc.*, 205 F.R.D. 466, 471 (S.D. Ohio 2001), *aff'd*, 370 F.3d 565 (6th Cir. 2004) (denying *Daubert* motion in order to consider class certification motion); *In re Visa*

(*cont'd*)

these circumstances, plaintiffs must still meet their burden of showing that the record evidence, including the expert's analysis and testimony, support a finding that impact for each class member can be proven through evidence that is common to the class.

As described below, the general framework for this inquiry is to (i) assess whether there are potential individualized issues of proof with respect to how the market operates, such as how prices are determined, (ii) understand how plaintiffs purport to show that the "but for" price—i.e., that which would exist without the alleged misconduct—can be demonstrated with common proof, and (iii) analyze whether plaintiffs met their ultimate burden of demonstrating that, *at trial*, the essential element of impact can be established through common evidence. The most common pitfalls that plaintiffs face in making this showing are outlined below.

A. Courts Must Perform a "Rigorous Analysis" of an Expert's Opinion and Resolve the "Battle of the Experts," Even If an Expert's Report Survives Daubert

As a threshold issue, it is the district court's responsibility to determine the persuasiveness of admissible expert testimony when necessary to resolve class certification issues—even if any flaws in an expert's opinion do not rise to the level of excludability under *Daubert*. Plaintiffs who prevail under *Daubert* may try to side-step this burden by emphasizing that courts historically have considered price-fixing conspiracies well-suited for class treatment.⁸¹ However, "it does not follow [from *Amchem*] that a court should relax its certification analysis, or presume a requirement for certification is met, merely because a

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Check/MasterMoney Antitrust Litig., 192 F.R.D. 68, 77 (E.D.N.Y. 2000) (discussing preliminary role of *Daubert* inquiry in class certification analysis) *aff'd*, 280 F.3d 124 (2d Cir. 2001).

⁸¹ See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (predominance is "a test readily met in certain cases alleging . . . violations of the antitrust laws.").

plaintiff's claims fall within one of those substantive categories."⁸² The court still must determine if the expert's opinion provides sufficient analysis to warrant certification.

In *Dukes*, the Supreme Court clarified once and for all that a court considering class certification under Rule 23 must look beyond the pleadings and conduct a "rigorous analysis" of the evidence to assess whether plaintiffs' proposed class meets the requirements of Rule 23.⁸³ As the *Dukes* Court observed, this rigorous analysis often requires a close look at the merits of the evidence put forth by the plaintiffs:

Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. The class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.⁸⁴

⁸² *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 313 (3d Cir. 2008) ("Private damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions." (citing Fed. R. Civ. P. 23(b)(3) advisory committee's note, 1966 Amendment)); *see also Robinson v. Tex. Auto. Dealers Ass'n*, 387 F.3d 416, 420-21 (5th Cir. 2004) ("There are no hard and fast rules . . . regarding the suitability of a particular type of antitrust case for class action treatment.").

⁸³ *See Wal-Mart Stores, Inc. v. Dukes*, 113 S. Ct. 2541, 2551 (2011); *see also Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982).

⁸⁴ *Dukes*, 131 S. Ct. at 255; *see also Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1234 (11th Cir. 2000) (collecting cases that considered merits when deciding a motion for class certification); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 & n.12 (1978) ("[T]he class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action' 'The more complex determinations required in Rule 23(b)(3) class actions entail even greater entanglement with the merits.'" (citation omitted)).

Notably, for class certification, the burden of proof rests with plaintiffs to put forth common proof of impact by a preponderance of the evidence. *See Hydrogen Peroxide*, 552 F.3d at 320; *see also In re Checking Account Overdraft Litig.*, Nos. 1:09-MD-02036-JLK et al., 2011 WL 3158998, at *2 (S.D. Fla. July 25, 2011) (to be published in F.R.D.) ("A district court may certify a class only if, after 'rigorous analysis,' it determines that the party seeking certification has met its burden of a preponderance of the evidence.").

Accordingly, it is the court's job to resolve any inconsistencies between the opinions of the experts. Significantly, most of the problems addressed above that may provide the basis for a *Daubert* motion, also provide defendants a basis to argue that, regardless of whether the plaintiffs' expert's testimony is formally excluded, it is still insufficient to satisfy plaintiffs' burden in proving that common issues predominate. Thus, for example, while reliance on a "price structure" analysis or "averages" may provide fruitful grounds for a *Daubert* motion, they also provide a basis for defendants to argue that plaintiffs have failed to meet their burden in demonstrating that they could prove each class member's claim through common proof. Of course, there was a clear trend in this direction in the case law well before the Supreme Court offered its own guidance in *Dukes* and *Comcast*.⁸⁵

⁸⁵ See, e.g., *Blades v. Monsanto Co.*, 400 F.3d 562, 569-70 (8th Cir. 2005) (court denied class certification where it "considered all expert testimony offered by both sides" and "afforded that testimony such weight as [the Court] deemed appropriate"); *In re New Motor Vehicles Can. Export Antitrust Litig.*, 522 F.3d 6, 17 (1st Cir. 2008) ("It would be contrary to the 'rigorous analysis of the prerequisites established by Rule 23 before certifying a class' to put blinders on as to an issue simply because it implicates the merits of the case."); *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) (same); *Unger v. Amedisys Inc.*, 401 F.3d 316 (5th Cir. 2005) (same); *In re Evanston N.W. Healthcare Corp. Antitrust Litig.*, 268 F.R.D. 56 (N.D. Ill. 2010) (citing *Hydrogen Peroxide*, 552 F.3d at 324) ("[r]esolving expert disputes to determine whether a class certification requirement has been met is always a task for the court—no matter whether a dispute might appear to implicate the 'credibility' of one or more experts, a matter resembling those usually reserved for a trier of fact").

Note, however, that before *Comcast*, a minority of circuits held that it is inappropriate to resolve merits issues related to expert testimony and would certify classes on the basis of plaintiffs' expert opinions so long as the experts' methodologies were not "worthless" or "inherently faulty." See *In re Polypropylene Carpet Antitrust Litig.*, 996 F.Supp. 18, 25, 29 (N.D. Ga. 1997); *Drayton v. W. Auto Supply Co.*, No. 01-10415, 2002 WL 32508918, at *6 n.13 (11th Cir. Mar. 11, 2002) (affirming the district court's refusal to conduct a *Daubert* analysis or to resolve a "battle of the experts" and finding that expert testimony proffered was sufficient at class certification stage to demonstrate that plaintiffs could show "common" proof of impact); *In re Commercial Tissue Prods.*, 183 F.R.D. 589, 596 (N.D. Fla. 1998) ("This case presents the familiar 'battle of the experts.' The certification stage of this litigation is not, however, the proper forum in which to resolve this battle.").

Dukes and *Comcast* make clear that this trend is now a requirement for lower courts. Thus, courts must perform a rigorous analysis and weigh the persuasiveness of the experts for both sides—even where the expert's testimony survives a *Daubert* analysis.

B. Defendants Should Attempt to Develop a Factual Record Demonstrating that Plaintiffs' Expert's Assumptions About the Actual World Are Incorrect

Even if a plaintiffs' expert uses an accepted methodology that is capable of demonstrating common impact under certain circumstances, that does not mean those circumstances exist in all or most cases. Expert's opinions often mask or ignore inconvenient evidence regarding how a market actually operates, which may include individualized issues as to how prices are determined. The new rigor at the class certification stage opens up opportunities for defendants to challenge these experts' opinions. In cases where the plaintiffs' expert's basic methodology can survive a *Daubert* challenge, the foundation for defeating class certification will often lie in the quality of the factual record that defendants can muster. Critically, even though plaintiffs bear the burden of proof, defendants are wise not to rely on a critique of the plaintiffs' evidence, but rather to develop their own evidence demonstrating why the plaintiffs' proffered methodology does not work in that particular case. Specifically, attacking the plaintiffs' factual assumptions regarding how the market actually operates depends on the defendants developing a robust factual record through declarations, deposition testimony, analysis of the relevant pricing documents, and analysis of the available data.

1. Price Lists and Price Increase Announcements

To meet their burden of proof plaintiffs commonly attempt to rely upon "price lists" or price increase announcements that at least ostensibly relate to all products purchased by putative class members. Prior to the more recent pronouncements regarding the rigor that courts should apply when determining class certification, courts were inconsistent in how to handle such

evidence. Even in cases in which defendants argued that prices were set through complex, individualized negotiations, courts often found that a uniform price increase raises the base price at which those negotiations begin and hence lends itself to common proof sufficient for the class certification stage.⁸⁶ Conversely, other courts declined to certify classes despite the use of price lists or price announcements when defendants were able to proffer evidence that individual variables impacted the setting of prices.⁸⁷

More recently, courts have been more willing to take a critical look at the relationship between price lists or price increase announcements and actual prices, recognizing that such evidence is only susceptible to common proof if the price lists or announcements are

⁸⁶ See, e.g., *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677, 689 (N.D. Ga. 1991) (inflated fares resulted in artificial "base" price which became benchmark for discounted or negotiated fares); *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc.*, 225 F.R.D. 208, 217 (S.D. Ohio 2003) (finding that price negotiations with each customer do not undermine plaintiffs' arguments related to common impact because conspiracy allegedly raised the starting price for negotiations); *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 486 (W.D. Pa. 1999) (finding that "even though some plaintiffs negotiated prices, if plaintiffs can establish that the base price from which these negotiations occurred was inflated, this would establish at least the fact of damage, even if the extent of the damage by each plaintiff varied"); see also *In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 383 (S.D.N.Y. 1996) (collecting cases); *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019 (N.D. Miss. 1993); *Hedges Enters., Inc. v. Cont'l Grp. Inc.*, 81 F.R.D. 461, 475 (E.D. Pa. 1979)).

⁸⁷ See, e.g., *Kenett Corp. v. Mass. Furniture & Piano Movers Ass'n, Inc.*, 101 F.R.D. 313, 314, 316 (D. Mass. 1984) (finding that although moving service established standard fee schedules, individual questions predominated because the bundle of moving services provided differed from mover to mover and customer to customer "in light of the costs facing the company at the time, its competitive market, its reputation, and the particular services required for the move"); *Am. Custom Homes v. Detroit Lumberman's Ass'n*, 91 F.R.D. 548, 550 (E.D. Mich. 1981) (finding that although defendant provided prices lists, individual questions predominated because actual purchases of defendant's product involved individualized negotiations that varied based on produce design, credit terms, negotiating power and specific purchase arrangements); *In re Beef Indus. Antitrust Litig.*, 1986-2 Trade Cas. (CCH), 1986 WL 8890 at * 2 (S.D. Tex. 1986) (finding that although defendant alleging part of cattle price was tied to "Yellow Sheet," individual questions predominated because the price for cattle depended on a "multitude of varying factors differing from one area to another" including weather, minimum cattle requirements, price competition and the beef by-product market).

actually used and followed. For example, in *Plastics*,⁸⁸ plaintiffs proffered a collection of defendants' documents that set forth price lists and price increase announcements for tins and ESBO. Because the plans detailed in the documents applied to all tin and ESBO products, plaintiffs claimed, all class members were impacted when they purchased those products.

In response, the defendants offered evidence demonstrating that there were wide variations in the prices actually paid by members of the putative class, including that the prices paid by some purchasers remained constant after the price increase announcements were issued and that prices for at least some putative class members declined during the class period.⁸⁹

Rather than blindly accepting the plaintiffs' assertion that all putative class members were impacted by the conspiracy in a manner that could be demonstrated through common proof, the *Plastics* court considered the record evidence in the case and concluded: "[T]he evidence of record shows that the prices paid by customers did not correspond with Defendants' price increases. Accordingly, the price lists and price increase announcements cannot serve as common evidence of impact."⁹⁰

Similarly, in *In re Florida Cement and Concrete Antitrust Litigation*, the court considered allegations that defendants conspired to raise the price of concrete by \$25. Because the defendants all announced a \$25 increase during the summer of 2008, plaintiffs asserted that the defendants' price increase announcements could serve as common proof of impact. The court disagreed, finding evidence "[t]hat some customers avoided paying price increases or artificially-

⁸⁸ *In re Plastics Additives Antitrust Litig.*, No. 03-CV-2038, 2010 WL 3431837, at *13 (Aug. 31, 2010).

⁸⁹ *Id.*

⁹⁰ *Id.*

stabilized prices, is inconsistent with Plaintiffs' theory of common impact."⁹¹ The court highlighted the flaws in the expert's uncritical reliance on the price lists:

In fact, Plaintiffs present no empirical analysis of the actual effect of the price increase announcements on individual customers to counter the evidence presented by Defendants, and unlike Dr. Ordover, Dr. Mangum did not conduct any significant analysis at the individual customer level to determine whether any price changes were consistent across the putative Class. Thus, Plaintiffs have not shown how the price increase announcements—even if they were intended to affect all customers across-the-board—constitute common evidence through which impact on the individual class members can be proven.⁹²

Finally, in *In re Graphics Processing Units Antitrust Litigation*, the court considered allegations of a price fixing conspiracy for the sale of graphics processors, which are "designed based on the specific application for which they will be used."⁹³ The court recognized that "[w]ithin these markets, defendants sold chips and cards of varying performance levels" based on the particular needs of the purchaser.⁹⁴ The court also highlighted that the graphics processor "products at issue were sold to a variety of customers through a number of distribution channels."⁹⁵

⁹¹ No. 09-23187-CIV, 2012 WL 27668, at *9 (S.D. Fla. Jan. 3, 2012).

⁹² *Id.*

⁹³ 253 F.R.D. 478, 480 (N.D. Cal. 2008).

⁹⁴ *Id.*

⁹⁵ *Id.* ("First, cards and chips were sold to original equipment manufacturers (OEMs), such as Dell or Hewlett-Packard. The OEMs then installed the cards or chips in their own computers for later resale to individual consumers. Second, chips were sold to add-in-board manufacturers (AIBs) who in turn incorporated them into their own cards. These cards could then be sold as standalone products for a retail price or to other computer manufacturers (e.g., OEMs) for incorporation into whole computers. Third, distributors could purchase chips or cards, which they in turn sold to other entities along the chain of distribution (i.e., AIBs, OEMs, or other

(cont'd)

The court focused on these complex characteristics that distinguished purchasers (all of whom were putative members of the same class) and concluded that price lists were not an accurate way of determining how prices were set in the GPU market:

[O]ver 99.5% of defendants' revenue during the limitations period came from sales with large wholesale purchasers like Microsoft. . . . [T]he vast majority of sales were primarily executed after customized negotiations between wholesalers and either defendant. These sales were made without any regard to a price list. As such, defendants' sales contracts varied significantly depending on the wholesale purchaser. . . . There is no doubt that a myriad of factors played a role in each large transaction. These factors each influenced the final sales price of each transaction.⁹⁶

Thus, the court held that these price lists could not serve as common proof of impact for the class.

As these cases demonstrate, in situations where the plaintiffs focus on price increase letters or price lists to establish common impact, defendants should make every attempt to determine whether individual customers *actually* paid prices that corresponded with those published prices. Developing evidence demonstrating that the prices in the real world market do not correspond to those price lists, or that individuals were able to avoid published price increases, should force the plaintiffs' expert to come up with something more to show common proof of impact.

2. Market Characteristics

(cont'd from previous page)

distributors). *Fourth*, retailers, such as Best Buy, could purchase graphics *cards* for later sale to individual consumers. *Fifth*, original design manufacturers (ODMs) purchased graphics *cards or chips* that would be incorporated into parts that would later be branded by another firm along the chain of distribution for sale. *Sixth*, ATI sold graphics *cards* online through its website ATI.com directly to individual consumers.").

⁹⁶ *Id.* at 490-91.

Additionally, plaintiffs' experts sometimes rely upon "market characteristics" to support their conclusion that impact can be shown through common proof. The critical inquiry is generally whether the record evidence demonstrates that the products are homogeneous.⁹⁷ Even before the trend toward a more rigorous analysis, courts have long found that when "the distinctions among the [products] offered are substantial[,] the process of assessing impact would be anything but mechanical."⁹⁸ But this is an area that has seen increased scrutiny since *Hydrogen Peroxide* and that trend should continue in the post-*Comcast* environment.

For example, in *Plastics*, the court recognized that, "in theory," characteristics such as the homogeneity of the products at issue and defendants' domination of the relevant market could make a market "vulnerable" to a price fixing conspiracy.⁹⁹ However, the court then discussed at length the evidence proffered by defendants demonstrating the heterogeneity of the products at issue: the different quality and strength properties in the defendants' products affected whether such products were suitable for different types of buyers' end uses, and customers clearly indicated a preference for the products of one defendant over another.¹⁰⁰ These qualities made it impossible for the court to find that market characteristics could serve as common proof of antitrust impact.

⁹⁷ *Nichols v. Mobile Cnty. Bd. of Realtors*, No. 76-619-P, 1980 WL 1975, at *7 (S.D. Ala. May 16, 1980) (collecting and comparing antitrust cases in which products were homogeneous or distinct); *In re Infant Formula Antitrust Litig.*, No. MDL 878, 1992 WL 503465, at *5 (N.D. Fla. Jan. 13 1992) ("Contentions of infinite diversity of product, marketing practices, and pricing have been made in numerous cases and rejected. Courts have consistently found the conspiracy issue the overriding, predominant question").

⁹⁸ *Nichols*, 1980 WL 1975 at *7.

⁹⁹ *In re Plastics Additives Antitrust Litig.*, No. 03-CV-2038, 2010 WL 3431837, at *8 (E.D. Pa. Aug. 31, 2010).

¹⁰⁰ *Id.*

Similarly, in *Florida Concrete*,¹⁰¹ the court weighed the evidence offered by both sides and found that "Plaintiffs fail to demonstrate that Concrete is indeed a homogenous product such that it can be used interchangeably."¹⁰² Importantly, the court rejected the notion that a defendant's expert must "perform enough quantitative analyses to prove that Concrete is not interchangeable and that the market characteristics are not such that the impact of the purported conspiracy would have been unavoidable."¹⁰³ Rather, the court highlighted that "it is not Defendants' burden to prove that the impact of the alleged conspiracy is not susceptible to common proof; to the contrary, it is Plaintiffs' burden to prove the impact is susceptible to proof by common evidence."¹⁰⁴

Additional factual issues for defendants to consider include whether prices are set by a single individual or by a large group of individuals operating in the field. The same types of individual issues that can undermine an employment class action in which plaintiffs are challenging employment decisions made by scores of individual managers across different offices (i.e., *Dukes*) can exist in an antitrust case in which purchases or sales are handled by scores of individual employees. Even where prices are ostensibly dictated by a single individual, defendants should scrutinize whether the individuals on the front lines actually followed whatever policies or directives were issued. A related issue is whether the relevant industry is a

¹⁰¹ *In re Fla. Cement & Concrete Antitrust Litig.*, 09-23187-CIV, 2012 WL 27668 (S.D. Fla. Jan. 3, 2012).

¹⁰² *Id.* at 13.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

"relationship" driven business in which sales and prices are determined more by the relationship of the individuals involved than by any directives received from corporate headquarters.¹⁰⁵

Consequently, where there is record evidence of non-price factors, such as perceived differences in service, quality, timeliness of deliveries, and willingness to accept returns, that may impact plaintiffs' purchasing decisions, defendants should challenge the notion that a market for homogeneous products is "susceptible" to common proof based on market characteristics alone.

C. Defendants Challenging an Expert's Opinion Under Rule 23 Should Also Attack Any Unreasonable Assumptions Made about the "But For" World

Defendants should attack any unreasonable assumptions built into an expert's models proffered to show common impact. It is the task of an antitrust plaintiff to "establish a 'but for' baseline—a figure that would show what competitive prices would have been if there had been no antitrust violations."¹⁰⁶ Construction of the "but for" world has never been a perfunctory task that plaintiffs (or courts) can take for granted; rather, damages can only be calculated "by comparing to that baseline what the actual prices were during the challenged

¹⁰⁵ Another argument defendants can make is that there are variations across the geographic regions included in the plaintiffs' proposed class. Although plaintiffs generally do not need to define a relevant geographic market in a per se price-fixing case, issues related to geographic market may be relevant where defendants show that localized markets and local pricing exist because these markets may raise individual questions about impact and damages. *See Behrend v. Comcast*, No. 10-2865, 2011 WL 3678805, at *7-8 (E.D. Pa. Aug. 24, 2011) (citing Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: an Analysis of Antitrust Principles and Their Application*, (3d ed. 1998-2007 & supp. 2008 ¶ 398b); *see also Blades v. Monsanto Co.*, 400 F.3d 562 (8th Cir. 2005) (denying class certification because of the localized nature of the markets for genetically modified corn and soybean seeds that exhibited substantial price variation.); *Behrend*, 2011 WL 3678805, at *7-8 (_____, J., concurring) (finding that geographic market is a relevant inquiry in a per se case where "the class definition includes a geographic component").

¹⁰⁶ *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1434 (2013).

period."¹⁰⁷ As the trend towards greater rigor in class certification continues, it will be essential that courts evaluate whether the plaintiffs' "baseline" matches up with what really happened in the relevant market or what would likely happen if the alleged misconduct did not exist.

In straightforward instances of an alleged price-fixing conspiracy in a market for a homogeneous product where prices are set by price lists, an expert may be able to construct an economic model that does not contain many—or any—suspect assumptions about "but for" pricing and output in the relevant market. In these scenarios, if an expert uses an acceptable methodology and applies it properly to the facts of the case, that expert likely will have offered acceptable opinions that could prove antitrust impact.

However, in more complicated cases where pricing is negotiated on an individualized basis—or where the alleged misconduct involves non-price related conduct—experts are likely to make certain assumptions about the way the market operates that can skew their analyses. This is especially true in those cases where individual plaintiffs may have complicated specifications, preferences, or other characteristics that make it difficult to extrapolate broad principles for the behavior of the entire class. In such scenarios, experts cannot merely "assume" that all plaintiffs will be impacted in the same way.¹⁰⁸ Indeed, such an assumption is grounds for the denial of class certification.¹⁰⁹

¹⁰⁷ *Id.*

¹⁰⁸ *See Blades*, 400 F.3d at 562 ("Simply put, plaintiffs presume class-wide impact without any consideration of whether the markets or the alleged conspiracy at issue here actually operated in such a manner as to justify that presumption. Dr. Leitzinger assumes the answer to this critical question . . .").

¹⁰⁹ *Id.*

Similarly, as made clear in *Comcast*, experts can no longer make assumptions that all theories of antitrust liability impact the plaintiffs in the same way.¹¹⁰ Therefore, an expert fails to establish an acceptable "but for" world if that expert cannot distinguish between supra-competitive prices resulting from antitrust misconduct and "prices whose level above what an expert deems 'competitive' [is] caused by factors unrelated to an accepted theory of antitrust harm."¹¹¹ Defendants should highlight instances where it is likely that the plaintiffs' expert is lumping together several theories of harm—for example, when plaintiffs include in their complaints market allocation allegations—or allegations related to other non-antitrust violations (such as misrepresentations or deceptive practices, or even competitive behavior). In such scenarios, if the court finds that one or more of these theories is not a viable antitrust theory of liability, then the expert's model must be able to disaggregate those theories of antitrust impact to support certification of the class.¹¹²

D. If Common Questions Predominate For Only Some of The Plaintiffs, The Court Can Sometimes Narrow The Scope Of The Proposed Class

Even if the court does not deny class certification on the basis of the aforementioned individualized questions of fact, under the rigorous standard a court may consider narrowing the proposed class based on the predominance requirement. For instance, the *In re GPU* court denied certification of the plaintiffs' proposed class but granted certification for a more limited class of direct purchasers.¹¹³ The court focused on the fact that some of the

¹¹⁰ See *Comcast*, 133 S. Ct. at 1435.

¹¹¹ *Id.*

¹¹² See *id.*

¹¹³ *In re Graphics Processing Units Antitrust Litig*, 253 F.R.D. 478, 508 (N.D. Cal. 2008).

proposed class members faced a non-negotiable price, while other proposed plaintiffs negotiated prices individually with the defendants.¹¹⁴ Accordingly, the court held that "[p]roof that defendants conspired to fix [list] prices would hardly prove that defendants also conspired to fix the *non-list prices* for the transactions entered into with absent wholesale purchasers."¹¹⁵

Defendants can ask the court to exclude customers who typically negotiate prices, if defendants find that some plaintiffs did make purchases solely based on list prices. While a court is generally under no obligation to redefine the class, it may be tempted to adopt this approach if it is particularly difficult to resolve the predominance issue. Moreover, in situations where defendants cannot make the aforementioned arguments on the basis of all members of the class, narrowing the proposed class to list-price customers can sometimes provide a way reducing the size of the potential damages in a price fixing case.

IV. STEP 3: CAN DAMAGES BE PROVEN ON A CLASS WIDE BASIS?

The most controversial issue in the wake of *Comcast* is whether the "rigor" under Rule 23(b)(3) referenced by the majority opinion applies to class action damages methodologies and proof generally or whether, instead, the case can be limited to its facts—i.e., the particular flaw in not disaggregating potential causes of harm that are not the basis of antitrust liability (discussed above).

¹¹⁴ *Id.* at 489-91.

¹¹⁵ *Id.* at 490; *see also In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 383-85 (S.D.N.Y. 1996) ("[W]e are persuaded that despite the wide range of products and prices involved, common proof of impact is possible on behalf of purchasers who bought list-price products. Common proof of impact is not possible, however, on behalf of those purchasers who bought non-list price products.").

We discuss below both the debate in the lower courts (and academic circles) on what *Comcast* means going forward, including how class action damages analysis is or will be affected in those cases where courts apply the full rigor of Rule 23(b)(3) in assessing whether damages for each class member can be proven at trial through common proof.

A. Preliminaries—A Whole New World After Comcast?

Comcast contains potentially wide-ranging implications for the subject of common proof of the amount of damages. At a minimum, *Comcast* stands for the proposition that any proposed common proof of damages under Rule 23(b)(3) must flow from the basis of antitrust liability proposed by the plaintiffs and accepted by the court. Thus, an expert's model calculating damages that failed to disaggregate potential causes of harm from those harms that the lower court accepted as a possible basis for antitrust liability was not consistent with plaintiffs' liability case.¹¹⁶ In other words, the model did not link antitrust harm to damages, dooming the plaintiff's class certification motion.

But the majority's opinion suggests a new rigor for scrutinizing class action damages evidence well beyond the narrow proposition that a damages model must link damage to harm. The opinion suggests that the rigor *Dukes* required courts to apply under Rule 23(a) applies now with equal, if not greater, force under Rule 23(b)(3). This would include, presumably, rigorous analysis in assessing common evidence regarding the measurement of damages.

The *Comcast* dissent claims the majority's opinion could not possibly be read to require damages be measureable on a classwide basis. But, this is not how many courts and

¹¹⁶ See generally *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

commentators have applied the rules and not the way the law is likely to develop. What the future holds, however, is far from certain.

1. Comcast Majority: The Need for Rigor Regarding Damages

In addition to the uncontroversial holding that a damages model must link the theory of harm to impact, the *Comcast* majority applied additional rigor in evaluating common proof of the amount of damages. The Court started from the observation that the predominance criterion under Rule 23(b)(3) demands even stronger proof than Rule 23(a),¹¹⁷ and noted that Rule 23(b)(3) itself is "an adventuresome innovation designed for situations in which 'class-action treatment is not as clearly called for.'"¹¹⁸ It held that a close look, including at arguments pertinent to the merits, is required to satisfy predominance.¹¹⁹ Under this rigorous standard, a proposed class cannot show Rule 23(b)(3) predominance in the damages context where "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class."¹²⁰ The Court added,

even if the model had identified subscribers who paid more solely because of the deterrence of overbuilding, it still would not have established the requisite commonality of damages unless it plausibly showed that the extent of overbuilding (absent deterrence) would have been the same in all counties, or that the extent is irrelevant to effect upon ability to charge supra-competitive prices.¹²¹

¹¹⁷ *Id.* at 1432.

¹¹⁸ *Id.* (citation omitted).

¹¹⁹ *Id.* at 1432-33.

¹²⁰ *Id.* at 1433.

¹²¹ *Id.* at 1435 n.6. This Article does not contend that plaintiffs must demonstrate that they suffered the same amount of harm to establish that common questions predominate after *Comcast*. The Court's indication that plaintiffs must offer proof of damages that establishes the "requisite level of commonality" does, however, underscore the Court's rigorous analysis of common proof of the amount of damages.

Applying this rigorous standard to the damages model proffered by plaintiffs' expert, the Court held that where the model measures "damages" that are not attributable to an accepted theory of liability, "the model cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)."¹²² The Court also identified three other situations where individualized damages might overwhelm common questions: (1) where plaintiffs' methodology cannot prove harm for a large portion of the class;¹²³ (2) where the "permutations" of damages are "nearly endless;"¹²⁴ and (3) where the proposed damages methodology is speculative.¹²⁵

2. Comcast Dissent: Attempting to Fence in the Majority

The dissent, written by Justice Ginsburg and Justice Breyer, with Justices Sotomayor and Kagan joining, argued that the Court's holding with respect to damages issues should be limited to the particular facts of the case. These four justices claimed that "[t]he decision should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable "'on a class-wide basis.'"¹²⁶

According to the dissent, plaintiffs must demonstrate and courts must find that questions of law or fact common to class members predominate over questions affecting only

¹²² *Id.* at 1433.

¹²³ *See id.* at 1434 (discussing how plaintiffs' "damages" may not have been tied to actual harm in Philadelphia and thus it was possible that many individuals in the Philadelphia DMA did not suffer actionable harm).

¹²⁴ *See id.* at 1434-35.

¹²⁵ *See id.* at 1433.

¹²⁶ *Id.* at 1436 (citation omitted).

individual members, but predominance does not demand commonality *as to all questions*.¹²⁷

The dissent claimed that,

Recognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal. . . . In the mine run of cases, it remains the 'black letter rule' that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members."¹²⁸

Indeed, the dissent argued that if a class action is an efficient mechanism for resolving common liability questions, "the predominance standard is generally satisfied even if damages are not provable in the aggregate."¹²⁹

The dissent's analysis with respect to damages is directly contrary to the holding of the Court. As discussed below, in the months since the case was decided, the Court has remanded several cases that lacked common proof of damages "in light of *Comcast*." Lower courts also have applied the *Comcast* court's rigorous analysis to proof of damages in the class setting, and commentators are reading *Comcast* to require the same.

B. How Comcast Is Being Applied To Class Damages Analyses

1. Greater Rigor Required

(a) Cases Vacated and Remanded (GVR) by the Supreme Court

Following *Comcast*, the Supreme Court has granted certiorari on, vacated and remanded three cases "in light of *Comcast*." In two of these cases, *In re Whirlpool Corp. Front-*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 1437. The dissenters noted that, instead of refusing to certify a class action, courts can divide classes into subclasses, certify classes for liability purposes only, or alter or amend cases as they develop. *Id.* at 1437 n.*.

*Loading Washer Products Liability Litigation*¹³⁰ and *Butler v. Sears, Roebuck and Co.*,¹³¹ the likely cause for remand is a lack of rigor in analyzing proof of damages.¹³²

In *Whirlpool*, consumers brought a putative class action against Whirlpool in connection with sales of front-load washing machines. Plaintiffs alleged breach of warranty, negligent design, and negligent failure to warn. According to the Plaintiffs, Whirlpool's front-load washing machines suffered from a design defect that made them prone to develop mold and mildew.¹³³ Plaintiffs alleged a class comprised of current Ohio residents who purchased one of the specified washing machines for personal, family or household purposes.¹³⁴

Whirlpool opposed class certification on the following grounds:

- The vast majority of washing machine owners had not experienced a mold problem;
- Whirlpool made dozens of changes between 2002 and 2009 to increase customer satisfaction and reduce service costs;
- Washers owned by class members were built on two different (although substantially identical) platforms, involved twenty-one different engineering models and spanned nine model years; and
- Consumer laundry habits are so diverse that plaintiffs presented individual liability questions.¹³⁵

The district court held that common questions of liability predominated and certified the class under Rule 23(b)(3). It noted that "[n]o matter how individualized the issue of damages

¹³⁰ 678 F.3d 409 (6th Cir. 2012) (GVR'd April 1, 2013).

¹³¹ 702 F.3d 359 (7th Cir 2012) (GVR'd June 3, 2013).

¹³² In the third, *Ross v. RBS Citizens, N.A.*, 667 F.3d 900 (6th Cir. 2013) (GVR'd April 1, 2013), Defendant RBS Citizens appealed solely on the ground that Plaintiffs' proposed class did not comply with Rule 23(c)(1)(B). As such, the opinion does not discuss damages or Rule 23(b)(3).

¹³³ *Whirlpool* 678 F.3d at 415.

¹³⁴ *Id.* at 412.

¹³⁵ *Id.* at 415.

may be, these issues may be reserved for individual treatment with the question of liability tried as a class action."¹³⁶ In a limited discussion, the Court noted that division of the class into subclasses would be sufficient to overcome any individualized issues with respect to damages.¹³⁷

In *Butler*, consumers brought a class action against Sears regarding its sale of allegedly defective Whirlpool washers based on warranty laws in six states.¹³⁸ The plaintiffs made claims regarding two alleged design defects: mold claims, similar to those made in *Whirlpool*, and control unit claims.¹³⁹ The control unit claims involved allegations that a soldering defect caused control units to mistakenly identify a serious error with the washing machine and automatically shut down the machine mid-cycle.¹⁴⁰

Plaintiffs sought to certify two classes: a class with "mold" claims and a class with "control unit" claims. For both classes, the court stated that there were common questions on liability. For the mold class, the question was, "were the machines defective in permitting mold to accumulate and generate noxious odors;" for the control unit class, the question was "whether the control unit was indeed defective."¹⁴¹ The court acknowledged that individual questions existed on the issue of the amount of damages and, at least for the mold class, that most members did not experience a problem. The district court certified the control unit class

¹³⁶ *Id.* at 419 (citation omitted).

¹³⁷ *Id.* at 421.

¹³⁸ *Butler*, 702 F.3d at 360-61. The defects all concerned Whirlpool-manufactured machines, but Sears was the defendant because it could still be strictly liable for breach of warranty, with a possible contribution or indemnification claim against Whirlpool. *See id.* at 363.

¹³⁹ *Id.* at 362.

¹⁴⁰ *Id.* at 363.

¹⁴¹ *Id.* at 362, 363.

and denied certification for the mold class. The Seventh Circuit affirmed certification of the control unit class and reversed denial of certification for the mold class.¹⁴² Judge Posner favored an "efficiency" approach to the predominance inquiry. According to the opinion, efficiency would be served through a single proceeding to resolve a central liability issue—whether the washing machines were defective. This liability proceeding "could be followed by individual hearings to determine the damages sustained by each class member."¹⁴³

In both *Whirlpool* and *Butler*, the lower courts failed to apply rigor to their analysis of proof of damages, instead suggesting that it could be resolved later. At the same time, the lower courts acknowledged that numerous plaintiffs within the certified classes did not suffer any direct harm, and even those plaintiffs claiming actual harm suffered "nearly endless permutations" of alleged harm. This is precisely the type of harm the Court found inadequate to establish classwide proof of damages in *Comcast*.

Although the Court did not explain why it was remanding these cases in light of *Comcast*, most commentators reasoned that it must be based on the greater rigor courts must use to assess theories of damages. For example, a Bloomberg Class Action Litigation Report suggested that the Supreme Court's remand of *Whirlpool* "could prompt additional scrutiny of the lack of injury for the majority of class members" as well as the 21 different types of washing machines purchased by class members. In both cases, any damages evidence must account for intraclass differences under *Comcast*.¹⁴⁴

¹⁴² *Id.* at 363.

¹⁴³ *Id.* at 362.

¹⁴⁴ John. H. Beisner, Jessica D. Miller & Geoffrey M. Wyatt, *From Cable TV to Washing Machines: The Supreme Court Cracks Down on Class Actions*, Class Action Litigation Report, 14 Class 616 (2013).

In another article commenting on the remand of both *Whirlpool* and *Butler*, the author noted:

In both *Comcast* and *Wal-Mart*[, the] linchpin to certification is assuring that determination of whether defendant's conduct caused injury to each class member can be made classwide and without resort to individualized assessments of each member's circumstances. . . . The major infirmity in *Butler* and *Whirlpool* is that each overlooked myriad permutations among hundreds of thousands of purchasers of different product models concerning the presence of mold and mildew, their causes, amounts of any resulting damages, customers' care of washers, whether requests for warranty service were made and timely, and defendants' responses to warranty claims.¹⁴⁵

He suggested, drawing on the language from *Comcast*, that when "permutations" of plaintiffs' alleged damages "are nearly endless," damages may not be capable of class wide measurement and instead may devolve into "labyrinthine individual calculations."

The article also took specific issue with Judge Posner's "efficiency standard" in *Butler*. The *Butler* court admitted that both whether each class member suffered any damages and, if so, the amount of those damages were individualized questions. The author argues the single common issue identified in *Butler*, "were the machines defective," cannot satisfy the Rule 23 test.¹⁴⁶ Another article concurred: "[T]he *Butler* court's treatment of the need for individual damages trials seems flatly inconsistent with the *Comcast* court's statements on the need for proof on a class-wide basis."¹⁴⁷

¹⁴⁵ Joseph M. McLaughlin, *Litigating the Effect of 'Comcast v. Behrend'*, N.Y. L.J. (June 13, 2013) at 2
http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202603956620&Litigating_the_Effect_of_Comcast_v_Behrend&slreturn=20130631142303.

¹⁴⁶ *Id.*

¹⁴⁷ Mass Tort Defense, *Supreme Court Remand Two Class Actions in Light of Comcast*, June 13, 2013.

Surprisingly, the Supreme Court’s directive to reconsider the cases “in light of *Comcast*,” and the views of most commentators, to a significant extent fell on deaf ears. In *Whirlpool*, the Sixth Circuit subsequently issued an opinion holding that the front-load washing machine class was properly certified notwithstanding *Comcast*. Relying on the *Comcast* dissent, the Sixth Circuit viewed the Court’s decision of limited relevance to the case before it because the district court “certified only a liability class and reserved all issues concerning damages for individual determination.”¹⁴⁸ In addition to essentially ignoring the GVR order on damages issues, the Sixth Circuit’s ruling overlooks the implications of *Comcast* for variations of injury within a putative class—e.g., the odor problem that manifested in only a small percentage of the washing machines.¹⁴⁹ Yet this only highlights that putative class members did not “suffer the same injury.”¹⁵⁰

Shortly thereafter, in *Butler*, the Seventh Circuit followed suit and reinstated the ruling that the classes could be certified, even in light of *Comcast*. The *Butler* opinion continued to rely on a standard centered around judicial efficiency, rather than predominance, as the requirement for class certification under Rule 23(b)(3). It also fails to grasp the implications of *Comcast*; indeed, at one point the court asks, puzzled, “[b]ut if we are right that this is a very different case from *Comcast*, why did the Supreme Court remand the case to us for reconsideration in light of that decision?”¹⁵¹

¹⁴⁸ *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, 722 F.3d 838, 860 (6th Cir. 2013).

¹⁴⁹ *See id.* at 855-56 (relying on an unsupported state law analysis that would allow class members to recover damages even when the defect had not manifested for plaintiffs).

¹⁵⁰ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011).

¹⁵¹ *Butler v. Sears, Roebuck & Co.*, 11-8029, 2013 WL 4478200 at *4 (7th Cir. Aug. 22, 2013).

Further, when the Seventh Circuit does address individualized damages issues, it sets up what appears to be a faulty dichotomy:

If the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification. Otherwise defendants would be able to escape liability for tortious harms of enormous aggregate magnitude but so widely distributed as not to be remediable in individual suits.¹⁵²

This result, Judge Posner warns, “would drive a stake through the heart of the class action device.”¹⁵³ But this conclusion only follows if one asserts that, after *Comcast*, satisfying predominance requires that plaintiffs suffer *identical* damages—a premise neither the *Comcast* majority nor the *Butler* defendants ever suggest. Instead, the *Comcast* majority implies that where endless permutations of plaintiffs’ damages would result in “labyrinthine individual calculations,” individual damage issues may predominate over common questions. The Sixth and Seventh Circuits may not believe such labyrinthine damages calculations are necessary in these cases, but their failure properly to address the issue is difficult to reconcile with the Supreme Court’s directive that the cases be reconsidered “in light of *Comcast*.”

More recently, the D.C. Circuit adopted the approach many anticipated the Sixth and Seventh Circuits would take. In *In re Rail Freight Fuel Surcharge Antitrust Litigation*, the D.C. Circuit exercised its jurisdiction over an interlocutory appeal from a class certification decision and vacated and remanded on certification grounds, in part due to the *Comcast* ruling.¹⁵⁴ In that case, shippers brought a class action against the four major freight railroads alleging a price

¹⁵² *Id.* at *5.

¹⁵³ *Id.*

¹⁵⁴ *In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869, 12-7085*, 2013 WL 4038561 at *8 (D.C. Cir. Aug. 9, 2013).

fixing conspiracy regarding the railroads' imposition of rate-based fuel surcharges.¹⁵⁵ Plaintiffs sought to certify a class of shippers who paid the purportedly inflated fuel surcharges.¹⁵⁶

Plaintiffs' expert prepared two regression models that would work in conjunction to demonstrate predominance under Rule 23(b)(3).¹⁵⁷ The "common factor model[] attempted to isolate the common determinants of prices shippers paid," and the "damages model" attempted to quantify the overage due to the alleged price fixing.¹⁵⁸ The district court accepted the models as "plausible" and "workable."¹⁵⁹

The D.C. Circuit, however, found plaintiffs' model defective because it proved too much. While the model appeared to show injury to all class members, it also "detect[ed] injury where none could exist."¹⁶⁰ This was because one group of shippers had entered in "legacy contracts" with defendants.¹⁶¹ These contracts guaranteed fuel surcharges would be subject to formulae that

¹⁵⁵ *Id.* at *1. Fuel surcharges are added on top of the base rate railroads charge customers for freight. *Id.* Historically, fuel surcharges have taken two forms: "mileage-based fuel surcharges," which raise total freight rates in proportion to shipping distances, and "rate-based fuel surcharges," which impose a surcharge as a function of the base rate once fuel prices exceed a "strike" or "trigger" price. *Id.* In 2003-2004 all four major railroads had fully switched to rate-based surcharges, and all four lowered the trigger prices. *Id.* The Surface Transportation Broad ended the practice, expressing concerns that, "the rationale for the fuel surcharges—fuel cost and recovery" was disconnected from the base rates on which the surcharges were based. *Id.* at *2. Following decision, plaintiffs here alleged the defendants engaged in price fixing under §1 of the Sherman Act. *Id.*

¹⁵⁶ *Id.* at *2.

¹⁵⁷ *Id.* at *3.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* (quoting *In re Rail Freight Fuel Surcharge Antitrust Litig. (Fuel Surcharge II)*, 287 F.R.D. 1, 67 (D.D.C. 2012).

¹⁶⁰ *Id.* at *5.

¹⁶¹ *Id.* at *1.

predated the allegedly anticompetitive surcharge changes.¹⁶² The expert’s damages model showed similar damages for legacy contract shippers and class members.¹⁶³

This critique of the expert’s model, the court explained, was “sharpen[ed]” by *Comcast*. After *Comcast*, “[i]f the damages model cannot withstand this scrutiny then, it is not just a merits issue. [Plaintiffs’ expert’s] models are essential to plaintiffs’ claim they can offer common evidence of classwide injury. No damages model, no predominance, no class certification.”¹⁶⁴ Thus, when a damages model includes damages for parties that could not have been harmed by defendants’ actions, the model must fail. As the court stated, “we have no way of knowing the overages the damages model calculates for class members is any more accurate than the obviously false estimates it produces for legacy shippers.”¹⁶⁵

The court’s analysis in *Rail Freight* further exposes the flaws in *Whirlpool* and *Butler* upon remand. As the D.C. Circuit pointed out, “[i]t is not enough to submit a questionable model whose unsubstantiated claims cannot be refuted through *a priori* analysis.”¹⁶⁶ Were that 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.”¹⁶⁷ This would explicitly contradict the holding of *Comcast*. A proper damages model must not only prove the possibility of damages, it must be limited to prove damages for only those plaintiffs who did or

¹⁶² *Id.*

¹⁶³ *Id.* at *5.

¹⁶⁴ *Id.* at *6 (internal citations omitted).

¹⁶⁵ *Id.* at *7.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* (citing *Comcast*, 133 S. Ct. at 1433).

could possibly suffer harm. As courts continue to weigh in on the standard for damages models under Rule 23(b)(3), we expect courts to embrace the logic of the D.C. Circuit in *Rail Freight* and further examination of the Sixth and Seventh Circuits' decisions, which seem wholly inconsistent with *Comcast*.

(b) Cases applying Comcast's Rigor Requirement on Proof of Damages

Applying the *Comcast* rigor requirement to proof of damages in putative class actions, several courts have held that class treatment under Rule 23(b)(3) was not warranted because individualized issues on damages would predominate over any common issues.¹⁶⁸ For example, in *Roach v. T.L. Cannon Corp.*,¹⁶⁹ employees sued Applebee's franchises in New York and Connecticut alleging violations of the New York Labor Law ("NYLL") and the Fair Labor Standards Act ("FLSA"). Plaintiffs sought to certify several classes, including a class of employees who were allegedly denied overtime wages when they worked more than ten hours in any particular day ("spread of hours"). A magistrate judge recommended that a class be certified with respect to plaintiffs' spread of hours claim, but the district court rejected the recommendation due to the subsequently-issued *Comcast* decision. The court described *Comcast* as holding that the failure of a class proponent "to offer a damages model that is 'susceptible of measurement across the entire class for purposes of 23(b)(3)' was fatal to the certification

¹⁶⁸ To date, other than *Rail Freight*, there have not been any antitrust cases applying post-*Comcast* rigor to proof of damages in class certification cases. However, there are a number of precedents in other areas of the law discussed below, which we expect will inform antitrust class certification analysis.

¹⁶⁹ No. 3:10-CV-0591, 2013 WL 1316452 (N.D.N.Y. Mar. 29, 2013).

question."¹⁷⁰ Specifically, the court found that the plaintiffs' failure to offer a damages model susceptible of measurement across the entire class "[was] in contravention of the holding in [*Comcast*]." Evidence that "some employees, on various occasions, were denied their 10-hour spread payments" indicated to the court that damages in the putative class would require highly individualized proof.¹⁷¹ Thus, the court concluded that questions of individual damage calculations would overwhelm common questions, and as such, Rule 23 certification had to be denied.

Similarly, in *Cowden v. Parker & Associates, Inc.*,¹⁷² the district court refused to certify a class because individual questions on damages would predominate over any questions common to the entire class. There, plaintiff insurance agents sued Parker & Associates, an insurance agency, for fraud, negligent misrepresentation, breach of contract, unjust enrichment, conversion and promissory estoppel, alleging that defendant failed to pay plaintiffs commissions for their sales of Medicare Advantage ("MA") Plans. Plaintiffs sought to certify a class of insurance agents who had worked for defendant as insurance agents selling MA Plans.¹⁷³

Plaintiffs recognized that their claims would require individual analyses for each agent's sales and expenses. Plaintiffs' compensation was commission-based, but could not be reduced to a formula or simple calculation. Instead, commissions were shared within a hierarchy of agents, through which an agent's superiors shared in the commissions of any agent lower on the hierarchy. It appeared that compensation was decided based on oral representations to each

¹⁷⁰ *Id.* at *3.

¹⁷¹ *Id.*

¹⁷² No. 5:09-323-KKC, 2013 WL 2285163 (E.D. Ky. May 22, 2013).

¹⁷³ *Id.* at *1.

agent. The defendant was also permitted to deduct from each agent's commission check expenses and fees including mailing expenses, fees for leads, commissions advanced to the agent but not earned because the carrier ultimately rejected the policy, and policy premiums owed to the defendant.

Citing *In re Whirlpool*, plaintiffs argued that "no matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action."¹⁷⁴ The court noted that *Whirlpool* had been vacated for further consideration in light of *Comcast*, and found that, as in *Comcast* and *Roach*, plaintiffs "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."¹⁷⁵

In re Montano v. First Light Federal Credit Union,¹⁷⁶ another post-*Comcast* decision, involved an adversary proceeding in bankruptcy court where the debtors sought class injunctive, declaratory and monetary relief based on a credit union's alleged violation of a discharge injunction through continued reporting of discharged debt as "past due" rather than "discharged." The district court denied plaintiffs' motion for reconsideration of the bankruptcy court's decision to decertify the class. It cited several bases for this decision, including *Comcast*, which the Supreme Court handed down one week after the bankruptcy court's decertification ruling. "*Comcast*," the court stated, "bolsters the Court's decision to decertify [the damages class], because there is no evidence [that] the damages they suffered would be susceptible of

¹⁷⁴ *Id.* at *6 (citation omitted).

¹⁷⁵ *Id.*

¹⁷⁶ Bankruptcy No. 7-04-17866-TL, 2013 WL 2244216 (D.N.M. May 21, 2013).

class-wide measurement."¹⁷⁷ Any damages would be individualized, "especially given the evidence that payment of the discharged debt likely would not be an element of damages in more than a few cases." And even if a model existed that was capable of proving class-wide damages, the court held that after *Comcast*, plaintiffs are not allowed "the luxury of waiting until trial" to come forward with proof that damages could be measured on a class-wide basis.¹⁷⁸

2. Cases Purporting to Follow the Comcast Dissent

A few courts have found the dissent persuasive and followed its approach on damages.¹⁷⁹

The Ninth Circuit has strongly resisted the *Comcast* opinion, instead siding with the dissent. The

¹⁷⁷ *Id.* at *7.

¹⁷⁸ *Id.* See also *Smith v. Family Video Movie Club, Inc.*, No. 1 CV 1773, 2013 WL 1628176, at *5 (N.D. Ill. Apr. 15, 2013) ("[After *Comcast*] damages must be susceptible to measurement across the entire class, and individual damage calculations cannot overwhelm questions common to the class."); *Phillips v. Asset Acceptance, LLC*, No. 09 C 7993, 2013 WL 1568092, at *3 (N.D. Ill. Apr. 12, 2013) ("[*Comcast*] may portend a tightening of class certification standards more generally, particularly as to the circumstances under which the task of measuring damages sustained by absent members destroys predominance under Rule 23(b)(3).").

¹⁷⁹ See *Munoz v. PHH Corp.*, 2013 WL 2146925, at *24 (E.D. Ca. 2013) ("The *Comcast* decision does not infringe on the long-standing principle that individual class member damage calculations are permissible in a certified class under Rule 23(b)(3)."); *In re High-Tech Employee Antitrust Litig.*, 2013 WL 1352016 (N.D. Cal. 2013) (quoting the *Comcast* dissent for the principle that "individual damage calculations do not preclude class certification under Rule 23(b)(3)" and finding that Plaintiffs satisfied their burden on damage calculations by providing a method of calculating damages consistent with their theory of liability); *In re Diamond Foods, Inc., Sec. Litig.*, 2013 WL 1891382 (N.D. Ca. 2013) (withholding judgment on whether *Comcast* requires class certification to be denied absent affirmative evidence that damages are susceptible of measurement across the entire class); *Harris v. comScore, Inc.*, 2013 WL 1339262 (N.D. Ill. 2013) (finding that "factual damages issues do not provide a reason to deny class certification when the harm to each plaintiff is too small to justify resolving the suits individually."). In *Harris*, however, the Court cited *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012), for the principle that efficiency concerns trump factual damages questions. *Butler*, as discussed in section IV.B.1.a, *supra*, was vacated and remanded by the Supreme Court on June 3, 2013, two months after the *Harris* opinion. It is unclear if the Court would have resolved the issue the same way if it had known the Supreme Court would remand *Butler*. Compare *Wang v. Hearst Corp.*, 2012 WL 1903787, at * 9 (S.D.N.Y. 2013) ("Indeed, although one could certainly

(cont'd)

leading Ninth Circuit case on the issue is *Leyva v. Medline Industries Inc.*, another employment class action seeking damages for violation of state labor laws.¹⁸⁰ The case concerned alleged employer rounding down of employee time and improper application of non-discretionary bonuses to overtime pay. The court rejected a broad reading of *Comcast* and found that in the Ninth Circuit, "the presence of individualized damages cannot, by itself, defeat class certification."¹⁸¹ The court found that *Comcast* requires only that plaintiffs show their damages "stemmed from the defendant's actions that created the legal liability."¹⁸²

One key fact in this case, which arguably distinguishes the case from most other Rule 23(b)(3) class actions, was that defendant's removal notice relied on its own electronic databases to calculate the amount in controversy for each claim and totaled the exposure on all claims. The defendant's apparent admission confirmed to the court that damages calculations would only entail a straight-forward, mechanical application of readily available data to individual plaintiffs. The ability to calculate individualized damages through such a process likely would prevent individual questions from overwhelming questions common to the class.

That interpretation of *Leyva* was relied on and adopted in *Parra v. Bashas', Inc.*, where the court found that plaintiffs' methodology for calculating back pay showed that damages were capable of measurement on a classwide basis. The court acknowledged that *Comcast* requires

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quibble with the significance of a grant, vacate, and remand ('GVR') order from the Supreme Court, one must pause at least for a moment when one sees that the Supreme Court, 'in light of *Comcast*,' has issued an order vacating and remanding a Seventh Circuit's decision affirming the district court's certification in an overtime misclassification case." (quoting *RBS Citizens, N.A. v. Ross*, — U.S. —, 133 S.Ct. 1722, — L.Ed.2d — (2013)).

¹⁸⁰ 2013 WL 2306567 (9th Cir. 2013)

¹⁸¹ *Id.* at *514.

¹⁸² *Id.*

proof that damages could be determined on a class-wide basis, but found that the plaintiffs' methodology for calculating damages correlated the legal theory of harm with the economic impact of that event. Further, similar to *Leyva*, the court found that once liability is established, calculating damages would be "a purely mechanical process" and thus there was no concern that individual questions would overwhelm common questions.

Martins v. 3PD, Inc.,¹⁸³ a post-*Comcast* case outside the Ninth Circuit, interpreted *Comcast* in a similar fashion. The court noted that even before *Comcast*, courts of appeal have found that predominance could be defeated where "questions of damage calculation are so complex or implicate so many potential class members, that they present a 'Herculean task' and overwhelm liability issues."¹⁸⁴ The court interpreted *Comcast* to leave open the possibility of class certification where some individual issues on the calculation of damages remain as long as those determinations "will neither be particularly complicated nor overwhelmingly numerous."¹⁸⁵

The Ninth Circuit has been criticized by commentators for its narrow interpretation of *Comcast* in the *Leyva* case. For example, on the issue of rounding, a plaintiff would need to establish that he clocked in and started working before his official start time. He would also need to establish the defendant rounded up to the official start time, illegally denying

¹⁸³ CIV.A. 11-11313-DPW, 2013 WL 1320454 (D. Mass. Mar. 28, 2013).

¹⁸⁴ *Id.* at *8 n.3 (citing *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 187 (3d Cir. 2001)). See also *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 342-43 (4th Cir. 1998); *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 68 (4th Cir. 1977).

¹⁸⁵ *Id.*

him compensation. As one author notes, "there could be significant individualized issue[s] as to when any particular employee started working on a given day." ¹⁸⁶

Another article suggested that *Leyva*, and not *Comcast*, is limited to its facts. *Leyva* had "straight-forward damages at issue" and "did not involve any argument that individual damages calculations would be expensive, extensive, time-consuming or complex."¹⁸⁷ The authors note that *Leyva* relies on a pre-*Comcast* Ninth Circuit decision to establish that damage calculations alone cannot defeat certification.¹⁸⁸ According to the authors, that premise may still be valid where damages involve "mere mathematical computation[s] of damages based on known data."¹⁸⁹ But, if the *Leyva* court meant that individualized damage inquiries can never predominate over common liability issues, that opinion "cannot be squared with *Comcast*."¹⁹⁰

C. Ways to Attack Damages Evidence Under the New Rigor

Defendants opposing class certification should make use of the Supreme Court's language in *Comcast* and seize on situations where individualized questions might overwhelm common questions. The following section lays out possible ways to attack motions for class certification based on failure to offer common proof of damages. This advice is drawn from

¹⁸⁶ Thomas Kaufman, *Ninth Circuit Rules that Comcast Does Not Kill Wage and Hour Class Actions*, Labor & Employment Blog (May 29, 2013), <http://www.laboremploymentlawblog.com/wage-and-hour-ninth-circuit-rules-that-comcast-does-not-kill-wage-and-hour-class-actions.html>.

¹⁸⁷ Andrew Paley and Patrick Ryan, *Ninth Circuit Reverses Denial of Class Certification Where Determining Damages is A Purely Mechanical Exercise*, Wage & Hour Litigation Blog (June 4, 2013), <http://www.wagehourlitigation.com/rule-23-class-certification/ninth-circuit-reverses-denial-of-class-certification-where-determining-damages-is-a-purely-mechanica-1/>.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

Supreme Court guidance, post-*Comcast* case law and commentary as well as case law predating *Comcast* that has been thrust back into the mainstream following the decision. In the sections that follow, the Article suggests defendants should first evaluate whether plaintiffs have provided a developed damages model. Then, assuming the plaintiffs have set forth a model, defendants should analyze whether damages modeled are susceptible to mathematical or formulaic calculation and attempt to identify individualized issues among the plaintiffs or the negotiation for the product.

1. Does the Plaintiff Provide a Formula to Calculate Damages?

At the most basic level, plaintiffs cannot establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3) without providing a formula that endeavors to accomplish the task. After *Comcast*, plaintiffs cannot promise that they will develop a damages model; they must have a model in place at the class certification stage. One commentator noted: "[After *Comcast*,] if a case is too big to devise a damages process that matches actual damages to actual litigants, a majority of the current court is likely to treat it as 'too big' for litigation."¹⁹¹

Roach v. T.L. Cannon Corp., a post-*Comcast* case discussed above, adopted this approach. Plaintiffs argued that they could address the liability question first without supplying a damages model because the damages issue "is separate from the question of liability."¹⁹² Even if such damages might be highly individualized, Plaintiffs "contend[ed] that damages need not be

¹⁹¹ Christopher M. Mason, Devon Haft Little & Sherli Yeroshalmi, *Supreme Court Addresses Problems of Size; 'Too Big' and 'Too Small' Cases Pose a Struggle*, __ N.Y. L.J. __ (2013).

¹⁹² No. 3:10-CV-0591, 2013 WL 1316452 at *3 (N.D.N.Y. Mar. 29 2013).

considered for Rule 23 certification."¹⁹³ The court flatly rejected this argument and found plaintiffs' failure to offer a damages model was fatal to class certification, following guidance from *Comcast*.¹⁹⁴

Similarly, *Rodney v. Northwest Airlines*,¹⁹⁵ a Sixth Circuit opinion that predates *Comcast*, denied certification partially due to plaintiffs' failure to offer a formula to calculate damages. In *Rodney*, plaintiffs' experts admitted they had not yet identified a methodology for calculating damages. Instead, they argued it was sufficient that they had a methodology that "could be used to calculate damages."¹⁹⁶ The court did not agree. Without a formula in place to compute damages, plaintiffs could not prove that class issues predominated.¹⁹⁷

One commentator suggested that post-*Comcast* a methodology capable of providing common proof of damages would be necessary even if plaintiffs wanted to separate the liability and damages portions of a class action. The author noted:

"[T]he opinion in *Comcast* is silent as to the availability of Rule 23(c)(4) to bifurcate the problematic damages portion of a class action. . . . Although Rule 23(c)(4) should remain available as a management tool in cases where common liability questions are found to predominate over individualized damages questions, an attempt to circumvent the holding of *Comcast* by carving out the individualized damages questions in order to satisfy Rule 23(b)(3) predominance would be at odds with the Supreme Court's holding in *Comcast*."¹⁹⁸

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ 146 F. App'x 783 (6th Cir. 2005).

¹⁹⁶ *Id.* at 791.

¹⁹⁷ *Id.*

¹⁹⁸ Barry M. Kazan & Gabrielle Y. Vasquez, *Viability of Rule 23(b)(3) Cases After 'Dukes,' 'Amgen' and 'Comcast'; Court Carves Narrow Path to Class Certification*, __ N.Y. L.J. __ (2013).

2. **Are Damages Susceptible to “Mathematical” or “Formulaic” Calculation?**

If plaintiffs have at least attempted to provide a formula to establish damages across the entire class, defendants should next consider whether damages can be properly calculated under the proposed methodology in a straight-forward fashion. Courts have identified three major areas where plaintiffs methodology fails to prove damages on a class wide basis: (1) where the product involves individualized negotiations; (2) where individual plaintiffs differ in ways that make proof of damages highly individualized; and (3) where plaintiffs offer a methodology to prove damages, but that methodology fails to account for differences between plaintiffs.

(a) **Does the Product at Issue Involve Individualized Negotiations?**

The post-*Comcast* decisions are nearly universal that where the product at issue involves individualized negotiations on price, damages issues are likely to overwhelm any common issues. This approach was taken by the Fifth Circuit nearly a decade ago in *Piggly Wiggly*, and is a key consideration when attempting to defeat class certification.¹⁹⁹

In *Piggly Wiggly*, plaintiffs brought a civil antitrust case alleging defendants conspired to fix the prices of bread and cake products in Texas and Louisiana.²⁰⁰ The proposed class included both wholesale purchasers and bid purchasers. Wholesale purchasers, typically small grocery and convenience stores, made purchases based on a price list provided by defendants, while bid purchasers, typically large grocery stores, school districts and local government entities, received

¹⁹⁹ *Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 100 F. App'x 296 (5th Cir. 2004).

²⁰⁰ *Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 215 F.R.D. 523 (E.D. Tex. 2003).

bids from defendants.²⁰¹ For bid purchasers, the court accepted plaintiffs' allegation that bids were based on the wholesale price lists given to wholesale purchasers.²⁰² However, the court found that plaintiffs could not establish that class members suffered injury to their business or property as a result of the conspiracy through common proof and therefore denied certification under Rule 23(b)(3).²⁰³

Even starting from the wholesale price list, as plaintiffs alleged, the final price ultimately was arrived at after negotiation. The court noted that the final price resulted from many factors including: the amount of product purchased, geographic market, the particular services included, delivery costs, the discount negotiated, and the negotiating skill of the parties involved. Because no two negotiations were exactly the same, "it [would] be impossible to present evidence in a common manner as to the price each Plaintiff would have paid but for the alleged conspiracy."²⁰⁴

The court further noted that predominance and manageability may be destroyed "solely by the complexity of determining damages when that determination does not lend itself to a mathematical calculation that can be applied to all class members."²⁰⁵ Plaintiffs' "mere assertions" that there are a number of methods or methodologies that could be utilized to prove damages were not sufficient.²⁰⁶ The court concluded, "Where the plaintiffs' damage claims

²⁰¹ *Id.* at 527.

²⁰² *Id.* at 528.

²⁰³ *Id.* at 530.

²⁰⁴ *See id.* at 531.

²⁰⁵ *Id.* (citing *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 67–68 (4th Cir. 1977); *In re Beef Indus. Antitrust Litig.*, 1986 WL 8890, *1 (N.D. Tex. 1986); *Dry Cleaning & Laundry Inst. of Detroit, Inc. v. Flom's Corp.*, 1993 WL 527928, *3 (E.D. Mich. 1993)).

²⁰⁶ On this point, see also section IV.C.1, *supra*.

'focus almost entirely on facts and issues specific to individuals rather than the class as a whole,' the potential exists that the class action may 'degenerate in practice into multiple lawsuits separately tried.'²⁰⁷ "In such cases, class certification is inappropriate."²⁰⁸

The Fifth Circuit affirmed the district court's ruling,²⁰⁹ holding that "[t]he necessity of calculating damages on an individual basis, by itself, can be grounds for not certifying a class."²¹⁰ Although it acknowledged that in antitrust cases there is a relaxed burden for proving the amount of damages once the fact of damages is proven, the court agreed with the district court that damages may not be merely speculative. The Fifth Circuit agreed with the district court that individualized issues such as negotiating ability and geographic market could not be included in a general formula.

Similarly, in *Mekani v. Miller Brewing Co.*,²¹¹ beer retailers brought a civil antitrust case alleging a conspiracy among brewers and beer distributors to fix prices and territories in violation of the Sherman Act as well as price discrimination in violation of the Robinson-Patman Act.²¹² Plaintiffs alleged that six major brewers and over 180 distributors engaged in horizontal and vertical conspiracies to fix the price of beer and establish and maintain noncompetitive geographic territories.²¹³ The proposed class consisted of beer retailers in Michigan.

²⁰⁷ *Id.* (quoting *Castano*, 84 F.3d at 745 n.19) (citation omitted).

²⁰⁸ *Id.*

²⁰⁹ *Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 100 F. App'x 296 (5th Cir. 2004)

²¹⁰ *Id.* at 297 (citations omitted).

²¹¹ 93 F.R.D. 506 (E.D. Mich. 1982).

²¹² *Id.* at 507.

²¹³ *Id.* at 509.

The court denied certification of both the Sherman Act and Robinson-Patman Act claims. On the Sherman Act claims, the court found that even if common questions would predominate on liability, "plaintiffs are still required to prove fact of injury."²¹⁴ The damages allegedly suffered by the class were not a function of a single event or decision made by the defendants, but rather resulted from a combination of decisions and factors specific to a given retailer-distributor transaction: here, prices and costs could vary depending on the local markets, the different brands purchased, and the different sales packages chosen.²¹⁵ These individualized facts made it impossible for plaintiffs to prove amount of injury on a class-wide basis and rendered the case "unmanageable as a class action."²¹⁶

Dry Cleaning & Laundry Institute of Detroit, Inc. v. Flom's Corp.,²¹⁷ another pre-*Comcast* decision, also found individualized negotiations created an impediment to plaintiffs' proof of class-wide damages. In *Dry Cleaning*, Michigan dry cleaners and a trade association alleged Sherman Act price fixing violations against dry cleaning and laundry supply companies. The court cited the same problems that doomed class certification in *Mekani* and *Piggly Wiggly*:

In the instant action, thousands of transactions were involved over many years; each transaction was different; various plaintiffs may have purchased the dry cleaning supplies, which varies by brand and type, at different prices and varying quantities, in different ways under different credit terms. No formula proposed would be even-handed among class members or fair to defendants.²¹⁸

²¹⁴ *Id.* at 511.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ 91-CV-76072-DT, 1993 WL 527928 (E.D. Mich. Oct. 19, 1993) (hereinafter "*Dry Cleaning*").

²¹⁸ *Id.* at *4.

(b) Do Individual Plaintiffs Differ in Ways that Make Proof of Damages Highly Individualized?

Even if plaintiffs do not engage in individualized negotiations, there may be important differences between the plaintiffs themselves that prevent mathematical or formulaic calculation of damages. *Bell Atlantic Corp. v. AT&T Corp.* provides one example of these types of differences.²¹⁹ In *Bell Atlantic*, discussed above, plaintiffs alleged AT&T attempted to monopolize the market for caller ID service by blocking the free passage of caller-ID data over its long-distance network.²²⁰ Plaintiffs sought to certify two classes: a "reverse charge" class comprised of businesses that purchased AT&T reversed billed long-distance service (e.g., "800" numbers) and caller-ID service and a "call recipient" class of businesses and organizations that were actual or potential purchasers of caller-ID service for long-distance calls.²²¹ The basic allegations were that but for AT&T's monopolization of caller-ID, plaintiffs could have avoided answering certain calls and spent less time on answered calls through the use of caller-ID. Plaintiffs claimed damages due to wasted employee time on phone calls and greater long-distance charges assessed on calls that would otherwise not have been answered.²²²

The court found class treatment is not appropriate in cases "where the calculation of damages is not susceptible to a mathematical or formulaic calculation."²²³ Class members ranged in size from primarily local sole proprietorships to large interstate corporations with call

²¹⁹ 339 F.3d 294 (5th Cir. 2003). For discussion of *Bell Atlantic* in the *Daubert* context, see Section II.B.4(b), *supra*.

²²⁰ *Id.* at 297.

²²¹ *Id.* at 299-300.

²²² *Id.* at 300.

²²³ *Id.* at 307.

centers, used different types of equipment, and had different volumes of repeat business, which would, in turn, change how effective caller ID would be for call screening.²²⁴ These individualized differences demonstrate the damages are "not susceptible to a mathematical or formulaic calculation," and therefore individualized proof overwhelms the common questions.²²⁵

The Supreme Court appears to agree that differences between individual plaintiffs can defeat common proof of damages. In *Comcast*, the court cautioned against certification where "permutations" of harm amongst plaintiffs "are nearly endless."²²⁶ Further, both GVR'd cases arguably contain such endless permutations of harm amongst plaintiffs. Key considerations on remand in those cases should include: how plaintiffs differed in their use of washing machines and the differences among the twenty-one types and nine model years of allegedly defective machines.²²⁷ Although the defendants in those cases do not argue plaintiffs negotiated differently, they can allege that the plaintiffs differ in ways which overwhelm common proof of damages.

(c) Do Plaintiffs Propose a Damages Formula Clearly Inadequate to Calculate Individual Damages?

Alternatively, defendants can attack plaintiffs' methodology for failing to adequately calculate individual damages. As discussed above,²²⁸ the use of averages can be a fatal flaw in a plaintiff's attempt to prove a common impact. While Defendants should challenge Plaintiffs'

²²⁴ *Id.* at 306, 307.

²²⁵ *Id.* at 307.

²²⁶ *Comcast*, 133 S.Ct. 1426, 1434-35 (2013).

²²⁷ See generally *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 678 F.3d 409 (6th Cir. 2012); *Butler v. Sears Roebuck & Co.*, 702 F.3d 359 (7th Cir. 2012).

²²⁸ See Section II.B.4(b), *supra*.

methodologies that rely on averaging under *Daubert*, they can also make damages-specific challenges outside of the *Daubert* context. Averages can provide even greater problems in trying to prove damages across an entire class. For example in *Bell Atlantic*, the court stated, "[c]lass treatment is not appropriate in cases . . . where the formula by which the parties propose to calculate individual damages is clearly inadequate."²²⁹ The plaintiffs' method relied primarily on averaging. Damages were calculated based on "average number of seconds saved per call [both long-distance and local] through the use of caller ID, an average wage rate for the typical employee answering and processing telephone calls, and the total number of AT&T calls to class members made during the class period." The formula was adjusted for the reverse charge class "using AT&T's billing records, to include recovery of any long-distance charges assessed against class members that might have otherwise been avoided through the use of caller ID."²³⁰ The court noted that plaintiffs' averaging formula "ma[de] no effort to adjust for the variegated nature of businesses included in the classes" and thus could not reasonably approximate actual damages suffered by class members.²³¹

Dry Cleaning, also discussed above, addressed similar methodological problems. In that case, plaintiffs attempted to supply a method for calculating damages that would overcome the problems of common proof caused by individualized negotiations. The method relied on "benchmarking," which the court rejected, correctly noting that this method failed to account for

²²⁹ *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 307 (5th Cir. 2003).

²³⁰ *Id.* at 300.

²³¹ *Id.* at 307.

the variation in markets, products, negotiating power and buyer size.²³² As a result, plaintiffs could not establish that common questions predominated over individualized inquiry on damages.²³³

Finally, *Reed v. Advocate Health Care* faulted the plaintiffs' expert for relying on averages.²³⁴ In *Reed*, registered nurses ("RNs") alleged health care organizations conspired to depress wages and exchange compensation information. Although plaintiffs proposed a formula to calculate damages, the court found the formula "unacceptably masks the significant variation in RN base wages during the Class Period." The court sided with defendants' expert, who noted:

[T]he relative movements of mere averages (means) do not prove common impact to individual RNs. For example, mean wages for Defendants' RNs could move together even though particular Defendants gave larger increases to certain, hard to find nurses, and smaller increases to others. The issue is the feasibility of common proof regarding individual nurses, not a hypothetical 'average' nurse.²³⁵

V. CONCLUSION

Comcast confirmed that there is a new rigor in Rule 23(b)(3) class actions, and it is not limited to issues of impact. And, in the wake of *Comcast*, both practitioners and economists must adjust their tactics and proof to this new environment, which itself will evolve fairly rapidly as lower courts continue to grapple with the requirements that the Supreme Court has imposed.

²³² *Dry Cleaning & Laundry Inst. of Detroit, Inc. v. Flom's Corp.*, 91-CV-76072-DT, 1993 WL 527928, at *5 (E.D. Mich. Oct. 19, 1993).

²³³ *Id.* at *6.

²³⁴ 268 F.R.D. 573, 590 (N.D. Ill. 2009). For a discussion of *Advocate Health Care* in the *Daubert* context, see Section II.B.4(B), *supra*.

²³⁵ *Id.* at 592 (citation omitted).