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LAUNDRY AND CABLE TELEVISION: HOW THE SEVENTH CIRCUIT PRESERVED CONSUMER PROTECTION CLASS ACTION LITIGATION FROM WASHING DOWN THE TUBES

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INTRODUCTION

Despite the nationwide availability of cheap consumer products and services in the marketplace, consumers lacked an inexpensive and suitable forum in which to bring small claims. Beginning in the latter part of the twentieth century, these claims found a home in federal class action, governed by Federal Rule of Civil Procedure (FRCP or Rule) 23. Class action litigation was designed to provide an efficient mechanism for multiple claims with common questions of law or fact to be brought as a single litigation unit. Subsection (b)(3) of Rule 23 permits consumers who have suffered relatively minor harms to bring their claims en masse, greatly defraying the cost of litigation.

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Basic economic principles dictate that potential plaintiffs who suffer monetary harm are unlikely to sue when the cost of litigating would result in nothing more than a pyrrhic victory. This economic disincentive is heightened when only *de minimus* monetary harms are at stake. An example of this type of class action claim comes from the District Court for the District of New Jersey. In *Katz v. Live Nation Inc.*, Live Nation customers filed a class action suit against the company for charging a mandatory six-dollar parking fee for each ticket, regardless of whether a ticket buyer drove to the venue.¹ These fees, when considered individually, were far too small to justify an individual bringing a lawsuit to vindicate his rights, but represented a large source of revenue for Live Nation, which benefited not from the size of the fee, but rather from the number of consumers charged.²

Commentators have viewed recent Supreme Court jurisprudence as tightening the requirements to survive class certification³—yet another move by a business-friendly court to curb consumer protections.⁴ One Supreme Court decision, *Comcast v. Behrend*,⁵ has sparked controversy in the realm of class action litigation by refining the predominance rules around damage classes.⁶

¹ *Katz, et al. v. Live Nation Inc.*, No. 09–3740 (MLC), 2010 WL 2539686, at *1 (D.N.J. Sept. 2, 2010). The case settled in 2014 for: (1) three (3) free lawn tickets to a Free Ticket Event, as described in sub-section 6(a) below; and (2) a coupon code for a five dollar (\$5.00) discount on ticket purchases. Amended Class Settlement Agreement And Release, 12, ECF. No. 85-1.

² Amended Class Settlement Agreement And Release 8, ECF. No. 85-1 (noting there are 362,928 class members).

³ Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013).

⁴ Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES, (May 4, 2013), http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html?pagewanted=all&_r=0; *Corporations and the Court*, THE ECONOMIST, (June 23, 2011), www.economist.com/node/18866873; Lee Epstein, William M. Landes, & Richard Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013).

⁵ 133 S. Ct. 1426 (2013).

⁶ Damages classes are those classes that seek classwide damages in addition to the other common questions of law or fact that the class has been organized for.

This Note's purpose is to look at how the Seventh Circuit has approached predominance⁷ through the lens of *Butler v. Sears, Roebuck, and Co. II*⁸ (*Sears II*) following the Supreme Court's decision to vacate and remand *Butler v. Sears, Roebuck, and Co. I*.⁹ Three questions will direct this discussion: How did the Seventh Circuit apply the Court's analysis to the facts of *Sears II*? Did the Seventh Circuit correctly interpret the majority decision to only apply to classes seeking classwide damages, or were they incorrectly swayed by Justice Ginsburg's dissent? To what extent are the circuit courts divided on how to apply *Comcast*?

Part I of the note will provide background information on class actions generally, including a brief review of the development of the predominance requirement. Part I will also provide the facts of *Sears II* and, the case's procedural history through the federal court system. Part II will review the analysis the Seventh Circuit used in its *Sears II* decision and discuss whether the court correctly interpreted *Comcast* in light of *Sears II*'s facts. Part III will look beyond the Seventh Circuit to the other circuits that have had the opportunity to review predominance in light of *Comcast* and consider whether, and to what degree, those courts agree with the Seventh Circuit. Part III will also look to how the district courts sitting within the Seventh Circuit have analyzed predominance. Finally, Part IV will offer my conclusions on the Seventh Circuit's *Comcast* application and its implications for the future of class action litigation in the Seventh Circuit.

⁷ The predominance inquiry found in Rule 23(b)(3) asks whether individual questions of fact or law will "overwhelm questions common to the class." *Comcast v. Behrend*, 133 S. Ct. 1426, 1433 (2013). Where "proposed classes are sufficiently cohesive to warrant adjudication by representation," the predominance test is satisfied and class certification should be granted. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

⁸ 727 F.3d 796 (7th Cir. 2013).

⁹ 702 F.3d 359 (7th Cir. 2012).

I. BACKGROUND

While the introductory paragraphs have discussed the basic reasons for having the class mechanism built into the federal rules, a more thorough discussion of the development of class actions and their current role will help frame the later conversation.

A. The development of Rule 23 and class action jurisprudence (1938 – present)

Rule 23 is a deviation from the general rule that litigation must be “conducted by and on behalf of the named parties only.”¹⁰ While class actions were included in the original 1938 Federal Rules, the class action framework we know today is the result of “a bold and well-intentioned [revision in 1966 designed] to encourage more frequent use of class actions.”¹¹ While the revisions did not initially spur a spate of collective litigation, the courts eventually took a liking to the tool in the mid-1980s when forced to respond to “dockets clogged with mass tort cases.”¹²

For the next fifteen to twenty years, class actions became a popular method for trying common claims. Two major factors created the conditions for Rule 23’s booming acceptance. First, high paydays encouraged plaintiffs’ attorneys to seek out potential class representative plaintiffs.¹³ Second, the high stakes of class litigation forced defendants to settle rather than “risk a potentially bankrupting judgment” at trial.¹⁴ The impulse to settle was strengthened by the lack of interlocutory review, now permitted under Rule 23(f), which forced

¹⁰ *Walmart v. Dukes*, 131 S.Ct. 2541, 2550 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)).

¹¹ Charles A. Wright, *Class Actions*, 47 F.R.D. 169, 170 (1970).

¹² Klonoff, *supra* note 3, at 736.

¹³ *Id.* at 737–38.

¹⁴ *Id.*

defendants to wait until final judgment to challenge class certification.¹⁵

Class action plaintiffs in recent years have suffered setbacks in Congress, with the Class Action Fairness Act, and with recent decisions in the United States Supreme Court. In 2005, Congress enacted the Class Action Fairness Act.¹⁶ The Act had two goals: reduce forum shopping by expanding the diversity jurisdiction rules to permit cases with minimum diversity¹⁷ where the collective amount in controversy exceeds five million dollars; and enhance review of class action settlements for fairness.¹⁸ The Act was intended to sweep truly national class actions into the federal courts, while preserving the state courts for disputes of a more local character under the “home state exception.”¹⁹ Congress believed plaintiffs were filing lawsuits in state courts known to be unfriendly for defendants and escaping removal by including non-diverse parties in the suits.²⁰ While having the added benefit of helping defendant corporations that preferred a federal

¹⁵ *Id.* Rule 23(f) reads: “APPEALS. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.”

¹⁶ Pub. L. 109-2, 119 Stat. 4-14 (codified at 28 U.S.C. §§ 1332(d), 1453, 1711–1715).

¹⁷ Minimum diversity exists where at least one defendant is diverse from at least one plaintiff. It stands in contrast to the general diversity rule, 28 U.S.C. § 1332, which requires that no plaintiff be from the same state as any defendant.

¹⁸ *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348 (7th Cir. 1996).

¹⁹ Jeffrey Roether, *Interpreting Congressional Silence: CAFA's Jurisdictional Burden Of Proof In Post-Removal Remand Proceedings*, 75 *FORDHAM L. REV.* 2745, 2760–61 (2007).

²⁰ *The Class Action Fairness Act, Five Years Later*, (April 12, 2010), www.mayerbrown.com/news/the-class-action-fairness-act-five-years-later-04-12-2010/. Essentially, plaintiffs’ attorneys would add non-diverse class representatives, simply to eliminate complete diversity, a death-knell to diversity jurisdiction in federal court at the time. By adding a non-diverse class representative or defendant to the mix, the class could proceed in state court without fear of removal to federal court, which lacked subject matter jurisdiction without complete diversity.

forum, the main goal of the Class Action Fairness Act was to prevent these forum selection abuses.²¹ On the whole, the Act has been successful at driving large class actions into federal forums, though forum shopping now takes place among the federal district courts rather than among the states.²²

Recent Supreme Court decisions have further curtailed class plaintiffs' choices to bring their suits and obtain class certification. Commenters point to five recent Supreme Court decisions—each decided by a bare 5-4 majority with the same five justices in the majority—that have fundamentally reshaped how class actions work in the federal system.²³ Through these five rulings, *Stolt-Nelson, S.A. v. Animalfeeds Int'l Corp.*, *AT&T Mobility LLC v. Concepcion*, *Wal-Mart v. Dukes*, *Genesis Healthcare Corp v. Symczyk*, and *Comcast Corp v. Behrend*, the Court restricted class actions for claims rooted in consumer contracts, employment contracts, and employment discrimination; permitted defendants to offer settlements to individual plaintiffs;²⁴ and allowed for closer scrutiny of proposed classes before certification.²⁵ One case stands in contrast to these five in its ruling for the plaintiffs seeking class certification: *Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds*, where the court refused to expand the amount of proof required to achieve class certification in securities fraud claims based on the “fraud on the market” theory.²⁶

With this backdrop in mind, the next subsection will review the basics of class certification and what plaintiffs must allege and prove.

²¹ *Id.* See also, S. REP. NO. 109-14 at 10–27 (2005).

²² *Id.*

²³ See, e.g., John Campbell, *Unprotected Class: Five Decisions, Five Justices, and Wholesale Changes to Class Action Law*, 13 WYO. L. REV. 463, 465 (2013).

²⁴ Potentially destroying class certification by eliminating numerosity.

²⁵ *Id.*

²⁶ 133 S. Ct. 1184 (2013).

B. Class certification requirements under Rule 23

In a Rule 23 evaluation, the court looks at several criteria to determine the worthiness of a class for certification. The threshold inquiry under Rule 23(a) depends on four elements: numerosity, commonality, typicality, and adequacy of representation.²⁷ These elements require the plaintiff to show that there are enough potential class members to warrant class certification, that there is a common question of law or fact among the parties, that the claims of the named plaintiff are typical of the rest of the class, and that the class counsel will adequately represent the interests of the class.²⁸ Once these elements have been satisfied, the class must fit into one of the three categories permitted under Rule 23(b). Subsection (b)(1), or limited fund classes are where the total amount of damages for all potential plaintiffs would exceed the defendant's assets, thus creating inconsistent standards of conduct for the defendant or affecting the rights of other plaintiffs not parties to the individual suit.²⁹ Subsection (b)(2) classes are where the defendant's conduct applies generally to the class, so that injunctive or declaratory relief is appropriate for the whole class.³⁰ Finally, subsection (b)(3) classes are where there are common questions of law or fact that predominate over individual issues such that class certification is "superior" to individual litigation.³¹

This comment will focus on the 23(b)(3) classification and specifically the predominance requirement therein. Predominance is a question of efficiency.³² The purpose of the predominance requirement is to make sure that the common questions of either law or fact are central to the issue of liability before the court. Where efficiency is the goal of the predominance test, common questions that only address

²⁷ Fed. R. Civ. P. 23(a).

²⁸ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997).

²⁹ Fed. R. Civ. P. 23(b)(1).

³⁰ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2013).

³¹ Fed. R. Civ. P. 23(b)(3).

³² *See Amchem*, 521 U.S. at 615–16.

ancillary or tangential issues of the litigation do not satisfy predominance because the cost and complexities of class litigation far outweigh the benefits obtained through combined litigation of common issues. For class litigation to be efficient, the common issues must move litigation far enough ahead such that only relatively minor individual issues remain.

Thus, the predominance requirement is not fulfilled where “individual questions . . . overwhelm questions common to the class.”³³ On the contrary, if common issues predominate, the requirement is fulfilled and class certification can proceed. Where there are *only* common questions among the class or there are *no* common questions among the class, no in-depth predominance analysis need be done.³⁴ In cases where both common and individual questions must be resolved, the court must consider several factors at the subjective discretion of the district court.³⁵

Three recent U.S. Supreme Court decisions have looked toward the predominance requirement in Rule 23; this Note’s purpose is to review how the Seventh Circuit has approached predominance through the lens of *Sears II*,³⁶ following the Supreme Court’s decision to vacate and remand *Butler v. Sears, Roebuck, and Co. I*.³⁷ The Court ordered the Seventh Circuit to reconsider the case in light of the Court’s ruling in *Comcast Corp. v. Behrend*,³⁸ where the Court held that “a damages suit cannot be certified to proceed as a class action unless the damages sought are the result of the classwide *injury* that the suit alleges.”³⁹

³³ *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184, 1193 (2013).

³⁴ *Butler v. Sears, Roebuck, and Co. I*, 702 F.3d 259, 361 (7th Cir. 2012) *vacated*, 133 S. Ct. 2768 (mem.) (2013).

³⁵ *Id.*

³⁶ 727 F.3d 796 (7th Cir. 2013).

³⁷ 702 F.3d 359 (7th Cir. 2012).

³⁸ 133 S. Ct. 1426 (2013).

³⁹ *Sears II*, 727 F.3d at 799.

C. Comcast Corp. v. Behrend *and the effect on predominance*

A group of plaintiffs filed suit in the District Court for the Eastern District of Pennsylvania alleging various antitrust violations against Comcast Corporation for using a monopoly to charge supra-competitive prices on cables services in certain markets.⁴⁰ The district court granted class certification despite dismissing three of the four antitrust claims as incapable of classwide proof.⁴¹ The court found that Comcast's activities created an impermissibly high barrier for new entrants into the affected markets and recognized that the plaintiffs' damages model was sufficient to measure the relief of the remaining theory of liability.⁴²

The Third Circuit, in a divided opinion, affirmed the findings of the district court; Comcast filed and was granted certiorari in the Supreme Court.⁴³

1. Justice Scalia delivers the opinion for the Court

Justice Scalia wrote the majority opinion for the Court and initially noted the necessity of the reviewing court to look beyond the pleadings to the underlying facts of the case because "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action."⁴⁴ Further, the Court notes that "addition[al] safeguards for (b)(3) class members beyond those provided for (b)(1) and (b)(2)," including the ability to opt-out of class litigation, indicate that courts must take a more in-depth look at the predominance question before certification is granted.⁴⁵

⁴⁰ *Comcast*, 133 S. Ct. at 1430.

⁴¹ *Id.*

⁴² *Id.* at 1431.

⁴³ *Id.* at 1431.

⁴⁴ *Id.* at 1432 (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ___, ___, 131 S. Ct. 2541, 2551-52 (2011)).

⁴⁵ *Comcast*, 133 S. Ct. at 1432.

With those concepts in mind, the Court proceeded to look at whether the district court properly granted class certification despite relying on a damages model that relied on all four theories of relief, rather than requiring the plaintiffs' expert to tailor the damages model to the remaining antitrust theory.⁴⁶ Based on testimony of plaintiffs' expert at a hearing in the trial court, the Court found that plaintiffs had not shown that the plaintiffs' damages model was capable of proving that damages are able to be calculated.⁴⁷ Thus, plaintiffs would have to prove damages individually, destroying predominance of common questions.⁴⁸

Justice Scalia focused on the failure of the Third Circuit to look into the merits of the case to determine the worthiness of the case for class certification.⁴⁹ Justice Scalia wrote:

The District Court and the Court of Appeals saw no need for respondents to “tie each theory of antitrust impact” to a calculation of damages. [*Behrend v. Comcast Corp.*] 655 F.3d [182] at 206 [(3d Cir. 2011)]. That, they said, would involve consideration of the “merits” having “no place in the class certification inquiry.” *Id.* at 206-207. That reasoning flatly contradicts our cases requiring a determination that Rule 23 is satisfied, even when that requires inquiry

⁴⁶ *Id.* at 1433.

⁴⁷ *Id.* at 1434.

⁴⁸ *Id.* at 1434–35. SCOTUSblog commentator Sergio Campos frames the issue as whether the claims are susceptible to common *answers* or whether common *questions* are all that are necessary for class certification. Sergio Campos, *Opinion analysis: No common ground*, SCOTUSBLOG (Mar. 29, 2013, 4:30 PM), <http://www.scotusblog.com/2013/03/opinion-analysis-no-common-ground>. His analysis relies on *Amgen* and *Wal-Mart* as proof of an on-going divide on the Court as to what a plaintiff must prove to succeed on the question of predominance. *Id.* The issue of whether a divide exists and, if so, which side is correct is not the subject of this paper; the analysis moving forward accepts the majority decision in each case as the rule of law.

⁴⁹ *Comcast*, 144 S. Ct. at 1433.

into the merits of the claim. *Wal-Mart [Stores, Inc. v. Dukes]*, 131 S. Ct. 2541, 2564 n.6 (2011).⁵⁰

Proceeding from the determination that the courts below had failed to apply the correct depth of inquiry into the predominance question, the Court applied the correct method and determined that “[t]here is no question that the model failed to measure damages resulting from the particular antitrust injury on which petitioners’ liability in this action is premised.”⁵¹

The failure, according to the Court, existed in the incongruity between the claims that survived Comcast’s motion to dismiss and the plaintiffs’ proposed method for calculating damages.⁵² While the Third Circuit waived off Comcast’s concerns of incongruity, reasoning that the damages model was not flawed at all,⁵³ the Court looked to the three remaining theories of liability the district court rejected, and posited that those alternate theories may be the cause of the increased prices in the market.⁵⁴

⁵⁰ *Id.* 1433.

⁵¹ *Id.*

⁵² *Id.* at 1434. The incongruity exists because the damages model was based on all four causes of action the plaintiffs initially alleged. Justice Scalia relied on the failure of the plaintiffs to adjust the damages model to fit the remaining cause of action as indication that the Plaintiffs could not show that the remaining cause of action resulted in an increase in cable rates.

⁵³ *Behrend v. Comcast Corp.*, 655 F.3d 182, 205 (3d Cir. 2011) (“The [damages model was] not intended to calculate damages, but instead to construct an estimated competitive “but-for” Philadelphia market (a market absent the alleged anticompetitive market). . . . In other words, the model calculates supra-competitive prices regardless of the type of anticompetitive conduct.”).

⁵⁴ *Comcast*, 133 S. Ct. at 1434–1435 (“The permutations involving four theories of liability and 2 million subscribers located in 16 counties are nearly endless.”).

2. Justice Ginsburg pens a sharp dissent, joined by Justices Breyer, Sotomayor, and Kagen

Justice Ginsburg began the Rule 23 discussion in her dissent by dismissing the possibility that the majority opinion should be read as breaking new ground on the predominance question.⁵⁵ Nonetheless, Justice Ginsburg did not quibble with the majority's conclusion that the "questions of law or fact common to class members predominate over any questions affecting only individual members."⁵⁶

The dissent took issue with the idea that damages stemming from a classwide injury must be measurable on a classwide basis.⁵⁷ The dissent pointed to a long line of cases that stand for the proposition that "individual damages calculations do not preclude class certification under Rule 23(b)(3)."⁵⁸ Most notably, the dissent pointed to *Amchem Products v. Windsor*, decided only sixteen years earlier, where the Court held exactly the opposite of the majority's ruling in *Comcast*.⁵⁹

To distinguish this case from the typical antitrust predominance issue, the dissent pointed to the unique procedural posture of the case. Here, the case was originally granted certiorari on the question of "[w]hether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a classwide basis."⁶⁰ Based on this question, the parties' briefing and oral arguments focused on the admissibility of expert testimony – a question that was not addressed in the majority's opinion.⁶¹

⁵⁵ *Comcast*, 133 S. Ct. at 1436 (Ginsburg, J., dissenting).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 1437 (citing a "legion" of appellate court decisions).

⁵⁹ *Id.* ("Predominance is a test readily met in actions alleging violations of the antitrust laws.") (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997)).

⁶⁰ *Id.* at 1435.

⁶¹ *Id.* at 1435–36.

The majority, instead, rephrased the question as to whether certification was proper where the plaintiffs had failed to establish damages could be measured on a classwide basis.⁶² This, the dissent noted, is “both unwise and unfair” because the respondents could not “train their energies” on the separate issue of whether they had satisfied the predominance requirement with their expert testimony.⁶³

3. The take-away: what does the decision mean for the future of the ability for classes to gain certification without the ability to prove classwide damages?

What the district and circuit courts should take away from this opinion is not quite clear. The majority’s opinion focuses on the lower courts’ failing to inquire deeply enough into the merits of the damages model, which the Court found to be legally insufficient to determine classwide damages.⁶⁴ But the dissent correctly identified a reluctance, at least at the circuit court level, to deny class certification where individual damages calculation is necessary, particularly in the antitrust context.⁶⁵

A fair reading of the case points to the need for district courts to conduct a “rigorous analysis that the prerequisites” of Rule 23 have been satisfied.⁶⁶ Thus, district courts should not hesitate to look beyond the pleadings to the merits, where doing so is necessary to determine whether class certification should be granted. As Justice Scalia notes, granting of class certification is a departure from the

⁶² *Id.* at 1431, n.4 (majority opinion).

⁶³ *Id.* at 1436 (Ginsburg, J., dissenting).

⁶⁴ *Comcast*, 133 S. Ct. at 1432–33 (majority opinion).

⁶⁵ *Id.* at 1437 (Ginsburg, J., dissenting) (“[W]hen adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate . . . [p]redominance is a test readily met in actions alleging violations of the antitrust laws.”) (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997)).

⁶⁶ *Comcast*, 133 S. Ct. at 1432 (majority opinion).

ordinary structure of civil litigation, and thus requires an “affirmative demonstrat[ion]” of worthiness.⁶⁷

The real question that arises is not whether courts need to look beyond the pleadings, but what kind of proof is required to demonstrate predominance. The Court makes clear that if a damages model is not reflective of the theories of liability and the relief sought, the model is an insufficient basis for Rule 23(b)(3) class certification.⁶⁸ The issue, though, is that the Court did not explicitly overturn *Amchem* or the generally accepted notion that individual determinations of damages do not foreclose the possibility of class certification.⁶⁹

Various lower courts have addressed the issue head-on including the Second, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits since the Court handed down its decision in March 2013. The Seventh Circuit also addressed this issue in *Butler v. Sears, Roebuck, & Co. II*, when the Court remanded *Butler v. Sears, Roebuck, & Co. I* for reconsideration in light of *Comcast Corp. v. Behrend*.⁷⁰

⁶⁷ *Id.*

⁶⁸ *Id.* at 1433.

⁶⁹ See Advisory Committee’s 1996 Notes on Fed. R. Civ. P. 23, 28 U.S.C.App. 141; 7AA Wright, Miller & Kane Federal Practice and Procedure § 1781, 235–37; 2 W. Rubenstein, Newberg on Class Actions § 4:54, 205 (5th ed. 2012) (ordinarily, “individual damage[s] calculations should not scuttle class certification under Rule 23(b)(3)”). Legions of appellate decisions across a range of substantive claims are illustrative. See, e.g., Tardiff v. Knox County, 365 F.3d 1, 6 (1st Cir. 2004) (Fourth Amendment); Chiang v. Veneman, 385 F.3d 256, 273 (3d Cir. 2004) (Equal Credit Opportunity Act); Bertulli v. Independent Assn. of Continental Pilots, 242 F.3d 290, 298 (5th Cir. 2001) (Labor–Management Reporting and Disclosure Act and Railway Labor Act); Beattie v. CenturyTel, Inc., 511 F.3d 554, 564–566 (6th Cir. 2007) (Federal Communications Act); Arreola v. Godinez, 546 F.3d 788, 801 (7th Cir. 2008) (Eighth Amendment). Antitrust cases, which typically involve common allegations of antitrust violation, antitrust impact, and the fact of damages, are classic examples. See *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 139–140 (2d Cir. 2001). See also 2A P. Areeda, H. Hovenkamp, R. Blair, & C. Durrance, *Antitrust Law* ¶ 331, 56 (3d ed. 2007); 6 A. Conte & H. Newberg, *Newberg on Class Actions* § 18:27, 91 (4th ed. 2002).

⁷⁰ 727 F.3d 796 (7th Cir. 2013).

PART II. BUTLER V. SEARS, ROEBUCK, AND COMPANY AND HOW THE
CASE CAME TO PROMINENCE

A. The plaintiffs file suit and seek class certification

Class representatives Susan Munch, Larry Butler, Joseph Leonard, and Victor Matos originally filed suit in December 2006 against Sears, Roebuck, and Co. [“Sears”] on behalf of similarly situated purchasers of various Kenmore Elite high-efficiency washing machines.⁷¹ The named representatives alleged various claims including violation of state consumer protection laws, common law fraud, and breach of implied warranty of merchantability.⁷² Their complaint alleged that each plaintiff had purchased a Kenmore washing machine in 2004 or 2005 and had, in short order, began experiencing mechanical issues, mechanical failure, clothes not being cleaned, stains occurring during the washing process, and mold and mildew growing inside the machines.⁷³

After the initial causes of action were dismissed, the plaintiffs amended their complaint to allege two major defects: electronic control board failure and water drainage failure. Sears again moved to dismiss in November 2007.⁷⁴ Plaintiffs realleged the state consumer fraud claims, an unjust enrichment claim, and sought declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.⁷⁵ The court again dismissed the state consumer fraud act claims, the unjust enrichment claim, and the § 2201 claim as to marketing and unlawful gains from extended warranties, but denied dismissal for the § 2201 claim for failure to honor its two-year warranty.⁷⁶

⁷¹ Munch v. Sears, Roebuck, and Co., 2007 WL 2461660 (N.D. Ill. 2007).

⁷² *Id.* at 1.

⁷³ *Id.*

⁷⁴ Munch v. Sears, Roebuck, and Co., Nos. 06 C 7023, 07 C 412, 2008 WL 4450307, at *1 (N.D. Ill. 2008).

⁷⁵ *Id.*

⁷⁶ *Id.*

The final version of the complaint alleged breach of warranty for two separate classes of plaintiffs: those whose machines suffered from the mold defect and those whose machines suffered from the control board failure.⁷⁷

B. The Northern District of Illinois rules on class certification; both parties appeal

The district court was asked to certify two separate classes: mold plaintiffs and control board plaintiffs.⁷⁸ While finding no issue with certifying the control board plaintiffs' class, the court carefully considered the mold plaintiffs' claims in light of the predominance requirement under Rule 23(b)(3).⁷⁹

Recognizing that the plaintiffs claimed the mold problem stems from a common defect with the machines that renders them unable to clean themselves, the court noted that Sears had taken several remedial steps to fix the mold issue.⁸⁰ Finding that neither the plaintiffs' expert nor the plaintiffs' themselves have accounted for how these remedial steps have impacted the mold growth in the machines, the court held that the issue is model dependent and not as pervasive as the plaintiffs allege.⁸¹ Thus, because the mold issues are model-specific and depend on Sears' knowledge of ongoing issues with the machines, the court found that the common issues do not predominate over the common questions and denied certification.⁸² Notably, the court rejected the plaintiffs' argument that the predominance inquiry employed requires an improper finding on the merits that is more appropriately left until after certification has been granted or denied.⁸³

⁷⁷ *Butler v. Sears, Roebuck, and Co.*, No. 06-cv-7023, 2011 U.S. Dist. LEXIS 157499, at *3–4 (N.D. Ill. 2011).

⁷⁸ *Id.*

⁷⁹ *Id.* at *14–16.

⁸⁰ *Id.* at *16.

⁸¹ *Id.* at *17.

⁸² *Id.*

⁸³ *Id.* (“The court notes that in the Seventh Circuit, preliminary inquiries into the facts and merits are appropriate in reviewing the predominance of common

C. The Seventh Circuit makes its initial ruling

The case first came before the Seventh Circuit on a Federal Rules of Civil Procedure 23(f) motion for an interlocutory appeal by both parties from the Northern District of Illinois' decision to deny class certification as to the mold issue and to grant certification in part as to the defective control unit issue.⁸⁴ The court's determination centered on the predominance question under FRCP 23(b)(3) and looked to whether the district court incorrectly denied class certification as to the mold issue.⁸⁵ The first issue was whether there was a common question concerning the predisposition of the machines to develop an odorous mold due to their design.⁸⁶ The court found that, despite Sears' claim that they sold twenty-seven different types of Kenmore machines over the period in question, only five of the various changes that Whirlpool, the machines' manufacturer, made were related to the mold issue. Thus, the common question—whether the machines were defective in permitting the growth of mold—is common to all parties.⁸⁷ The only issue requiring individual determination was the amount of damages owed.⁸⁸

The second issue was whether the court had correctly granted class certification for the defective control unit claims. The crux of the complaint is that Sears knew about a defect during manufacture of the control boards yet continued to manufacture machines with defective boards and charge customers with defective machines hundreds of dollars to fix the defect.⁸⁹ The court, again, found a common question in whether the control boards were indeed defective and that the only

issues for certification purposes.”) (citing *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 676–77 (7th Cir. 2001)).

⁸⁴ *Butler v. Sears, Roebuck, and Co.*, 702 F.3d 359, 361 (7th Cir. 2013).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 363.

issue requiring individual determination was that of harm suffered by the class members.⁹⁰

Finding that there were common questions among all class members, the court found that the claims predominated over the individual damages claims and were sufficient to warrant class certification with the caveat that the district court may wish to create subclasses depending on the specific model of washing machine or the state in which the class member resided to comply with state law.⁹¹ The Seventh Circuit denied Sears' petition to rehear the case *en banc* in December 2012.⁹²

D. Petition for Certiorari and the Supreme Court's involvement

Following the Seventh Circuit's decision, Sears petitioned the Supreme Court for certiorari.⁹³ The Supreme Court in a memorandum opinion vacated the Seventh Circuit's judgment and remanded the case for review in consideration of the Court's recent decision in *Comcast Corp. v. Behrend*.⁹⁴

E. The Seventh Circuit's rehearing on remand

The Seventh Circuit framed the issue on remand as an issue of law: "whether the *Comcast* decision cut the ground out from under our decision ordering that the two classes be certified."⁹⁵ With this in mind, Judge Posner, writing for the unanimous court, evaluated the implication that *Comcast* has on the court's ruling in *Sears I*.⁹⁶ Judge Posner argued that the *Comcast* holding is simply that "a damages suit

⁹⁰ *Id.*

⁹¹ *Id.* at 362-63.

⁹² *Id.*

⁹³ Petition for Writ of Certiorari, *Butler v. Sears, Roebuck, and Co.*, 2013 WL 768586, (No. 12-1067).

⁹⁴ *Sears, Roebuck, and Co. v. Butler*, 133 S. Ct. 2768 (mem.).

⁹⁵ *Butler v. Sears, Roebuck, and Co. II*, 727 F.3d 796, 798 (7th Cir. 2013).

⁹⁶ *Id.* at 799.

cannot be certified as a class action unless the damages sought are the result of classwide injury that the suit alleges.”⁹⁷ Thus, the Court’s ultimate rule is that a damages model that does not identify damages that are the result of the wrong is insufficient to warrant class certification.⁹⁸

Judge Posner applied this broadly: washing machine mold class members only seek damages attributable to mold while control unit class members only seek damages attributable to the control unit defect.⁹⁹ He went on to distinguish this case factually from the *Comcast* decision. In *Comcast*, the district court attempted to determine damages on a classwide basis; not so in this case.¹⁰⁰ Rule 23(c)(4)¹⁰¹ permits the segregation of issues so that classes can move forward solely on the common issues that predominate while maintaining the individual issues unique to specific class members for separate resolution.¹⁰²

Rejecting the damages determination as the rationale for the Court’s decision to remand, Judge Posner proceeded to the evidentiary requirements *Comcast* emphasized are necessary to prevent class litigation from proceeding where individual issues actually predominate.¹⁰³

The court rejected Sears’ argument that the district court’s analysis was not sufficiently thorough to satisfy the *Comcast* requirement and holds that individual damages need not be identical across all class members to satisfy predominance.¹⁰⁴ This standard, the

⁹⁷ *Id.* (emphasis omitted).

⁹⁸ *Id.*

⁹⁹ *Id.* at 800.

¹⁰⁰ *Id.*

¹⁰¹ “*Particular Issues*. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.” Federal Rule of Civil Procedure 23(c)(4).

¹⁰² *Butler v. Sears, Roebuck, and Co. II*, 727 F.3d 796, 800 (7th Cir. 2013). *See also* Advisory Committee Notes to 1966 Amendment of Rule 23(b)(3); *Pella Corp. v. Saltzman*, 606 F.3d 391, 393–94 (7th Cir. 2010) (per curiam).

¹⁰³ *Sears II*, 727 F.3d at 800.

¹⁰⁴ *Id.* at 801.

court argued, would effectively spell the death knell of class certification and is far afield from what the Supreme Court held in *Comcast*.¹⁰⁵

The court concludes by reinstating its November 13, 2012, order granting class certification:

There is a single, central, common issue of liability: whether the Sears washing machine was defective. Two separate defects are alleged, but remember that this class action is really two class actions. In one the defect alleged involves mold, in the other the control unit. Each defect is central to liability. Complications arise from the design changes and from separate state warranty laws, but can be handled by the creation of subclasses.¹⁰⁶

Sears subsequently petitioned for, and was denied certiorari.¹⁰⁷

III. THE SEVENTH CIRCUIT CORRECTLY NARROWED THE APPLICABILITY OF *COMCAST* TO CLASSES SEEKING CLASSWIDE DAMAGES

A. A brief analysis of the Seventh Circuit's Post-Comcast Predominance Jurisprudence

To understand the Seventh Circuit's interpretation of *Comcast v. Behrend*, it is necessary to look at how the court has interpreted predominance in three recent decisions: *Sears II*; *Parko v. Shell Oil Co.*;¹⁰⁸ and *Ira Holtzman, C.P.A. & Assocs. V. Turza*.¹⁰⁹ In each of these cases, the Seventh Circuit was faced with determining whether the district court below had correctly ruled on whether the common

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 801–02.

¹⁰⁷ *Sears, Roebuck, and Co. v. Butler*, 2014 WL 684064 (2014).

¹⁰⁸ 739 F.3d 1083 (7th Cir. 2014).

¹⁰⁹ 728 F.3d 682 (7th Cir. 2013).

issues predominated over the class. These rulings establish the contours of the Seventh Circuit's predominance jurisprudence following *Comcast*.

In each case, the court applies the same rule from *Comcast* regarding the necessity of a damages model to fit the theory of liability. In *Sears II*, the court distinguished between the classes here and the class in *Comcast* on both factual and legal grounds.¹¹⁰ Interestingly, while holding that predominance requires a review of the merits, the Seventh Circuit specifically rejected the notion that "a class action limited to determining liability on a classwide basis, with separate hearings to determine . . . the damages of the individual class members" does not satisfy predominance.¹¹¹ This is contrary to the *Comcast* ruling where Justice Scalia implicitly rejected the notion that a class should be granted Rule 23(b)(3) certification where damages have to be calculated individually.¹¹²

In *Sears II*, Judge Posner maneuvered around this point of contention by focusing on factual and procedural distinctions between the cases. Judge Posner relied on two basic distinctions. First, the plaintiffs in *Comcast* "fail[ed] to base all the damages they sought on the . . . injury of which the plaintiffs were complaining," which was not so in *Sears II*. Second, the district court in *Sears II* was not asked to determine damages on a classwide basis, unlike *Comcast*.¹¹³

The Seventh Circuit's conclusion is clear when viewed through the lens of the other two, much more clear-cut, cases mentioned above.

In *Ira Holtzman*, the court determined the validity of a district court's granting of class certification to a class of plaintiffs who had received fax-based solicitation in violation of the Telephone Consumer

¹¹⁰ *Sears II*, 727 F.3d at 800.

¹¹¹ *Id.*

¹¹² Justice Scalia foreclosed the notion, and the dissent spent significant time arguing against the idea, that a class action could proceed without a method for determining classwide liability by reversing the decision of the lower courts instead of simply holding the damages model as insufficient to base classwide adjudication of the antitrust impact.

¹¹³ *Sears II*, 727 F.3d at 800.

Protection Act of 1991, 47 U.S.C. § 227.¹¹⁴ Deciding that the *Comcast* case was inapposite to the facts at issue, the court pointed to the statutory remedy that allows easily calculable damages for each member of the plaintiff class.¹¹⁵ The court concluded that an easily calculable remedy, such as the statutorily available remedy available to the class members here, was completely distinguishable from the facts in *Comcast*.¹¹⁶ While in *Comcast*, the majority feared that individual calculation of damages would subsume the common issues,¹¹⁷ here there is no fear that the common questions of law or fact would not predominate over individual determination of damages.¹¹⁸

Importantly, the damages available are not simply a matter of dividing a pot of money among all of the class members; rather, the class members would all have to prove they have actually received the faxes at issue.¹¹⁹ Once the court determined the receipt of the faxes and the number received, the calculation of damages would simply be the product of the number of faxes received and the statutory damages permitted.¹²⁰ Because the calculation of damages, though needing individual determination, would require nothing more than multiplying the number of faxes received by the amount of statutory damages available, the defendant's liability to the group as a whole easily predominated over individual issues.¹²¹

Finally, in *Parko v. Shell Oil Co.* decided in January 2014, the Seventh Circuit, for the first time since *Comcast*, rejected class certification based on the district court's improper finding of predominance.¹²² Here, the plaintiffs sought class certification to pursue claims against various defendants for allegedly leaking

¹¹⁴ *Id.* at 683.

¹¹⁵ *Id.* at 684.

¹¹⁶ *Id.*

¹¹⁷ *Comcast v. Behrend*, 133 S. Ct. 1426, 1433 (2013).

¹¹⁸ *Ira Holtzman, C.P.A., & Assocs. v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1084 (7th Cir. 2014).

“benzene and other contaminants into the groundwater under the class members’ homes.”¹²³ The Seventh Circuit rejected class certification, finding that the plaintiffs had not met their burden to prove that common questions would predominate over the class because a determination of liability and damages would require individual, rather than classwide evaluation.¹²⁴ The court found that even assuming the plaintiffs could survive the threshold Rule 23(a) requirements, damages would have to be determined individually based on the diminution in property value each class member has suffered.¹²⁵ The court further pointed to the inability of the residents to exclude any other cause for the loss in property value or to even fix causation on the alleged groundwater contamination.¹²⁶

Taking these cases together, the Seventh Circuit has clearly defined the predominance inquiry in the post-*Comcast* world. With *Sears II* and *Holtzman*, the court has defined the two areas where classes will be able to achieve class certification under FRCP 23(b)(3): 1) where the class bifurcates the damages question from liability such as in *Sears II*; and 2) where the class seeks determination of classwide damages but damages are susceptible to such a determination, such as in *Holtzman*. On the other side of the coin, the court defined when classes will not achieve class certification through *Parko*: where the determination of damages requires individualized inquiry into the harm caused by the defendants.

These cases provide district courts with a clear picture of what putative classes should be granted certification and which would run afoul of the Supreme Court’s ruling in *Comcast*. Indeed, the Northern District of Illinois and the Northern District of Indiana have already taken up the question of whether class certification is appropriate based on the Court’s decision in *Comcast*. In seven district court cases,

¹²³ *Id.* at 1084.

¹²⁴ *Id.* at 1087.

¹²⁵ *Id.* at 1086.

¹²⁶ *Id.*

only two putative classes failed to achieve class certification.¹²⁷ The rest of the cases relied on a broad reading of the Seventh Circuit's analysis in *Sears II* and distinguished the Supreme Court's reasoning on the facts of *Comcast*.¹²⁸

B. The Seventh Circuit's Opinion Properly Applied Comcast to Plaintiffs Seeking Class Certification

Numerous scholars predicted the *Comcast* decision would result in a reduction of courts granting class certification.¹²⁹ While it is

¹²⁷ *Tamas v. Family Video Movie Club, Inc.*, No. 11 C 1024, 2013 WL 4080649, at *9 (N.D. Ill. 2013); *Harris v. Reliable Reports, Inc.*, No. 1:13-CV-210 JVB, 2014 WL 931070, at *9 (N.D. Ind. 2014) (“[I]t would be premature to strike Harris’s class . . . when no discovery has been undertaken.”).

¹²⁸ *Fox v. Riverview Realty Partners*, No. 12 C 9350, 2014 WL 1613022, at *6 (N.D. Ill. 2014) (relying on a class of only 100 members (compared to the two million members of the *Comcast* case) and a “mechanical” damages calculation); *Kurgan v. Chiro One Wellness Centers LCC*, Case No. 10-cv-1899, 2014 WL 642092, at *8 (N.D. Ill. 2014) (relying on the statutory structure of the Illinois Minimum Wage Law to find that adjudication of liability would “aid in resolving damages” and the manageability of their determination); *Reliable Reports*, 2014 WL 931070, at *9 (relying on *Espenscheid v. Directsat USA, LLC*, 705 F.3d 770, 776 (7th Cir. 2013) for the proposition that “the district court must carefully explore the possible ways of overcoming problems in calculating individual damages.”); *Driver v. AppleIllinois, LLC*, Case No. 06 C 6149, 2013 WL 5818899, at *11–12 (N.D. Ill. 2013) (“Applying *Comcast* as expansively as Smith suggests would virtually prohibit class certification in wage and hour cases . . . There is no indication in *Comcast* that the Court intended to undo the 67 years of decisions setting FLSA damages under the burden-shifting framework of *Mt. Clemens*.”); *Healey v. Int’l Bhd. of Elec. Workers, Local Union No. 134*, 296 F.R.D. 587, 594–95 (N.D. Ill. 2013) (distinguishing *Comcast* on the fact that this case only has forty class members and that some damages-related issues are common to the class); *Tamas*, 2013 WL 4080649 at *9 (finding that plaintiffs had not sufficiently proven that the liability issues predominated); *Harris v. comScore, Inc.*, 292 F.R.D. 579, 589 (N.D. Ill. 2013) (“[I]ndividual 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.”).

¹²⁹ See, e.g., Campbell, *supra* note 23, at 480; Ellen Meriwether, *Comcast Corp. v. Behrend: Game Changing or Business as Usual?*, 27-SUM ANTITRUST 57,

likely too soon to tell whether the doom-and-gloom future for class actions will come to fruition, the Seventh Circuit's analysis in *Sears II* keeps that concern at bay.

First, if we look at the Seventh Circuit's predominance jurisprudence before the High Court handed down its opinion in *Comcast*, it is apparent that very little, if anything, has changed.¹³⁰ In *Espenscheid v. DirectSat USA, LLC*, the Seventh Circuit recognized in the (b)(3) context that where calculation of damages is "mechanical, formulaic, a task not for a trier of fact but for a computer program" the court need not deny class certification.¹³¹ Similarly, in *Messner v. Northshore University Health System*, the Seventh Circuit vacated and remanded a district court's denial of class certification for a putative (b)(3) class of antitrust plaintiffs.¹³² In a case very similar to the facts of *Comcast*, the Seventh Circuit held that proof of "uniformity of price increases" was a bridge too far to achieve class certification.¹³³

57 (2013) ("[W]hile the holding of the case within its factual context provides little support for a conclusion that the decision has significantly altered the class certification landscape, certain of the Court's comments may provide fodder for defense arguments that plaintiffs must offer a damages model capable of proving damages for individual class members."); Klonoff, *supra* note 3, at 799–800 ("It remains to be seen whether Comcast will now cause lower courts to depart from the traditional rule that individualized damages issues normally do not defeat class certification. Courts and commentators are already divided on what the impact of the case will be."); Campos, *supra* note 48.

¹³⁰ See, e.g., *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 773 (7th Cir. 2013) (decided one month before *Comcast*); *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010) (three years before *Comcast*); *Arreola v. Godinez*, 546 F.3d 788, 801 (7th Cir. 2008) (five years before *Comcast*).

¹³¹ 705 F.3d at 773.

¹³² 669 F.3d 802, 819 (7th Cir. 2012).

¹³³ *Id.* This case is an interesting counterexample to *Comcast* and is worth much greater consideration on its own merits. Suffice it to say, the case is factually distinguishable from *Comcast* on the basic point that defendants did not challenge the congruity of the injury alleged with the damages sought, only that the damages would require individual calculation. In this way, *Messner* is very much like the *Holtzman* case discussed *supra* where uniformity of damages is not necessary to satisfy the predominance inquiry. See *Ira Holtzman, C.P.A. & Assocs. v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013).

Further, the court upheld certification for a bifurcated trial where individual trials would be held to determine causation and damages for each class member while the court would determine the common issue of defect in certain models of Pella windows.¹³⁴ Finally, the court noted the flexibility district courts have with class certification when it held that despite variances in each class member's personal damages, "judges can devise solutions to address that problem if there are substantial common issues that outweigh the single variable of damages amounts."¹³⁵

Thus, the Seventh Circuit has correctly not changed the tune that "Rule 23 allows district courts to devise imaginative solutions to problems created by the presence . . . of individual damages issues."¹³⁶ The court will continue to grant class certification where damages are not subject to classwide determination. Instead of foregoing 23(b)(3) classes or creating an increased barrier to entry, the court relied on the mechanism in Rule 23(c)(4) to limit classes to liability, while reserving individual determination of damages for a later day.

The Seventh Circuit's conclusion plainly fits within the limiting language both the dissent and the majority employed in their respective opinions.¹³⁷ *Comcast* has truly broken no new ground for classes seeking certification under Rule 23(b)(3), both in the Seventh Circuit and for each circuit to have considered the issue. For example the Fifth, Sixth, and Tenth Circuits all held, following *Comcast*, that bifurcation of the liability and damages questions renders the *Comcast* ruling inapplicable.¹³⁸ Further, the Second, Ninth, and D.C. Circuits

¹³⁴ *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010).

¹³⁵ *Arreola*, 546 F.3d at 801.

¹³⁶ *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

¹³⁷ *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1433 (2013) ("We start with an unremarkable premise. If respondents prevail on their claims, they would be entitled only to damages resulting from reduced overbuilder competition."). *Id.* at 1436 (Ginsburg, J., dissenting) ("[T]he opinion breaks no new ground on the standard for certifying a class action under Federal Rule of Civil Procedure 23(b)(3).")

¹³⁸ See *In re Deepwater Horizon*, 739 F.3d 790, 817 (5th Cir. 2014) (internal quotation marks omitted) ("[T]he rule of *Comcast* is largely irrelevant where determinations of liability and damages have been bifurcated in accordance with

agree that predominance may still be satisfied where individual calculations of damages are necessary.¹³⁹ Only two circuits, the Eighth and the Eleventh, have considered predominance without applying *Comcast* to the facts; both courts denied certification because the plaintiffs could not successfully prove *any* common issue predominated.¹⁴⁰

In short, the Seventh Circuit has considerable support in refusing to depart from the common understanding that “individual damages calculations do not preclude class certification under Rule 23(b)(3).¹⁴¹ Despite the concerns of academics and commentators, and the current Supreme Court trend to heighten class action prerequisites, the Seventh Circuit has put *Comcast Corp. v. Behrend* in its rightful place: the case clarifies the district court’s need to investigate the merits of class certification and to require congruence between the

Rule 23(c)(4).”); *Glazer v. Whirlpool Corp.*, 722 F.3d 838, 860 (6th Cir. 2013) (internal quotation marks omitted) (“Where determinations on liability and damages have been bifurcated . . . the decision in *Comcast* . . . has limited application.”); *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1220 (10th Cir. 2013) (noting that individualized damages do not destroy class certification where a class may be certified for liability purposes only and leaving damages for individual proceedings).

¹³⁹ See *Catholic Health Care West v. U.S. Foodserv.*, 729 F.3d 108, 122 (2d Cir. 2013) (“[B]ecause the question whether the invoices materially misrepresented the amounts due to [defendant] is common to all plaintiffs, the class will prevail or fail in unison on this point—rendering certification appropriate.”); *Leyva v. Medline Indus.*, 716 F.3d 510, 513–14 (9th Cir. 2013) (“[T]he presence of individualized damages cannot, by itself, defeat class certification.”); *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244, 252 (D.C. Cir. 2013) (common evidence must show all the class members were actually harmed by the alleged wrongdoing, but not necessarily the amount of damages incurred).

¹⁴⁰ *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 779 (8th Cir. 2013) (rejecting class certification where questions of liability would require individual inquiries and “will predominate over whether Auto-Owners’s process was reasonable and overwhelm questions common to the class.”); *Bussey v. Macon County Greyhound Park, Inc.*, No. 13–12733, ___ Fed.Appx. ___, 2014 WL 1302658, at *6 (11th Cir. 2014) (reversing the district court’s grant of class certification for failure to conduct a “rigorous analysis”).

¹⁴¹ *Comcast*, 133 S.Ct. at 1437 (Ginsburg, J., dissenting).

injury alleged and the damages model before predominance is satisfied.

IV. CONCLUSION

What we can take away from the Seventh Circuit's jurisprudence is that not much has changed, as the *Comcast* dissent correctly predicted.¹⁴² When the Supreme Court decided *Comcast* in 2013, an overwhelming majority of scholars predicted that Rule 23 had been forever altered. Professor John Campbell, at the University of Denver, predicted that "many meritorious claims will either never get started, die on the vine, or, even if they do succeed, provide relief to a more narrowly drawn class."¹⁴³ Others have similarly chimed in, fretting over the future of class action litigation.¹⁴⁴

The Court, perhaps unintentionally, provided myriad reasons for these prognosticators to wring their hands. Not the least of which was changing the question presented after the parties had briefed the issues, rejecting the *prêt à porter*¹⁴⁵ *Daubert* issue in exchange for the unchallenged predominance question.¹⁴⁶ If these commentators had stepped back from the decision for a moment, they would have understood the narrowness of Justice Scalia's opinion. Most notably, the Court made no attempt to backpedal from *Amchem Products v. Windsor*, nor does the Court attempt to establish any new rule of law. Despite the bend-over-backwards approach the Court used to reach this question,¹⁴⁷ *Comcast*'s biggest contribution to the predominance jurisprudence is clarification of certain principles already generally accepted in the circuit and district courts.¹⁴⁸

¹⁴² *Id.* at 1436 (Ginsburg, J., dissenting).

¹⁴³ Campbell, *supra* note 23, at 480.

¹⁴⁴ *See, e.g.*, Meriwether, *supra* 129, at 57; Klonoff, *supra* note 3, at 799–800.

¹⁴⁵ Ready to wear.

¹⁴⁶ *Comcast*, 133 S. Ct. at 1435 (Ginsburg, J., dissenting).

¹⁴⁷ It would make sense if the Court reached to address this question.

¹⁴⁸ Including the requirement of the district court to "look beyond the pleadings" to perform a rigorous analysis to determine whether class certification

And the Seventh Circuit agrees.

Through the *Sears II* decision, the court makes clear that the predominance requirements have not meaningfully changed with the *Comcast* decision. Had *Comcast* meant what the commentators had predicted, the Seventh Circuit could have relied on the district court's reasoning and held that common proof of damages for class members is required and rejected certification.¹⁴⁹ Plainly, the Seventh Circuit refused to do so.

Moreover, the reasoning in *Sears II* is consistently applied through the court's decisions in *Holtzman* and *Palko*, indicating that the *Sears II* conclusion is not an aberration. Finally, the decisions of the district courts within the Seventh Circuit and the other circuit courts strengthen the weight of the Seventh Circuit's opinion. There does not seem to be a court within the Seventh Circuit, district or circuit, nor a circuit court in the country that agrees with the doom-and-gloom outlook peddled in early 2013.

Moving forward, the question will be to what degree the Supreme Court is satisfied with the Seventh Circuit's reasoning. The Court's denial of certiorari for *Sears II* suggests that the Seventh Circuit's decision is in line with what Justice Scalia advocated. Yet the recent history of the Supreme Court's Rule 23 jurisprudence intimates otherwise. Thus, one must ask, will the Supreme Court fall in line with its decisions in *Walmart* and *AT&T Mobility* to further constrain consumers rights under Rule 23? Or does the Court's decision in *Comcast* mark a degree of satisfaction with where class action law stands today? *Sears II* may well be the key to answering that question.

should be granted; the need for common issues to predominate over individual issues; and that common liability issues cannot predominate where damages for over two million class members would have to have damages calculated individually. See *generally id.* (majority opinion).

¹⁴⁹ *Butler v. Sears, Roebuck, and Co. II*, 727 F.3d 796, 801 (7th Cir. 2013).