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DAMAGES

CERTIFICATION

Class certification rulings in 2014 show the continued importance of the Supreme Court's 2013 decision in *Comcast*, and the need for sufficient evidence at the class certification stage establishing how damages can be resolved on a classwide basis, attorney David E. Kouba says. The author examines the key rulings applying *Comcast*, and discusses the bases courts used in certifying classes in certain cases while rejecting others.

Comcast in 2014: Plaintiffs in Most Class Actions Must Show Damages Using Common Proof at Certification Stage

BY DAVID E. KOUBA

The Supreme Court in *Comcast Corp. v. Behrend* held in 2013 that plaintiffs seeking class certification must establish that damages can be proven using classwide evidence.[1]

[1] *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432-33 (2013).

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Throughout 2014, courts have continued to apply this aspect of *Comcast*. These decisions confirm that, as a general rule, plaintiffs must offer evidence at the class certification stage that shows that damages can be resolved on a classwide basis using common proof.

Some courts, however, have been willing to relax this requirement when the only individual damages questions concern the amount of damages for each class member, and those questions can either be bifurcated or resolved through some mechanical computation.

Courts Apply *Comcast* Rules

As discussed below, courts in 2014 have continued to apply *Comcast* by asking two related questions: (1) did plaintiff offer any proof that damages could be resolved on a classwide basis, and (2) if so, is that proof sufficient to resolve classwide damages based on the plaintiff's theory of liability.

As discussed below, when the answer to either one of these questions was no, courts have denied certification.

Damages Provable With Classwide Evidence

Courts have continued to recognize that *Comcast* forecloses class certification where plaintiffs do not offer evidence showing how damages are amenable to common proof. In *Rice v. Sunbeam Products, Inc.*, for example, plaintiff claimed that the class suffered economic harm when purchasing allegedly misrepresented

 ISSN 1529-0115

Crock-Pots, but she did not offer any model showing how this harm could be established on a classwide basis.

The court denied certification under *Comcast*, explaining that ''plaintiff must supply at least some expert evidence about the true market value of a defective Crock–Pot,'' but ''made no such showing, as she has not proffered any expert evidence at all on the subject of calculating relief.''[2]

Likewise, in *Rahman v. Mott's LLP*, the court denied plaintiff's motion to certify a class of consumers who purchased apple juice labeled as having ''No Sugar Added.'' The court explained that resolving the question of damages would ''likely involve demonstrating what portion of the sale price was attributable to the value consumers placed on the 'No Sugar Added' statement,'' and that plaintiff had ''introduced no evidence'' showing that such damages could ''feasibly and efficiently be calculated'' on a classwide basis.[3]

As in *Rice* and *Rahman*, several other courts denied certification last year when plaintiffs did not offer any model or other evidence of classwide damages.[4] These outcomes reflect a straightforward application of *Comcast*, and, going forward, courts are likely to continue rejecting certification when plaintiffs offer no proof that damages can be resolved on a classwide basis.

Proof of Damages Must Survive Rigorous Analysis

Courts also repeatedly confirmed in 2014 that simply offering a classwide model or other proof alone will not obtain certification if, upon a rigorous analysis, that evidence does not show that damages caused by the alleged misconduct can be proven on a classwide basis.

In *POM Wonderful*, for example, plaintiffs' expert offered a classwide damages model, which plaintiffs claimed showed purchasers of POM Wonderful juice paid a premium as the result of defendant's alleged misrepresentations. The court, however, reviewed plaintiffs' model and observed that, even though the model showed purchasers paid more for POM Wonderful than they would have for other types of juice, the model made no effort to determine why the price was higher. The model ''instead assumed that 100% of that price difference was attributable to Pom's alleged misrepresentations.'' The court found that such a model ''[did] not comport with *Comcast*'s requirement that classwide damages be tied to a legal theory, nor can this court conduct the required 'rigorous analysis' where there is nothing of substance to analyze,'' and thus decertified the class.[5]

Similarly, in *Werdebaugh v. Blue Diamond Growers*, the court found certification improper after concluding that the plaintiff's proposed model was insufficient to establish damages on a classwide basis. Plaintiff sought to recover on behalf of purchasers of almond milk, and alleged that defendant misrepresented those products as ''all natural'' and as containing ''evaporated cane juice.'' Plaintiff's expert offered a regression analysis purporting to show the damages suffered by the class, but, after reviewing this analysis, the court concluded that it ''[could] not reasonably determine the measure of damages attributable to Defendant's wrongful conduct.''[6]

The court in *Paulsboro Derailment Cases* declined to certify a subclass seeking lost income that resulted from a train derailment and release of toxic chemicals for the same reason. Although plaintiffs offered a model purporting to show that lost income could be proven on a classwide basis, the court analyzed that model and concluded that ''[p]laintiffs fail to show that their proposed method of damages calculation would be accurate for all potential class members. Further, the proposed method does not take into account other reasons that some businesses might have reported decreased income in the applicable quarter . . . . Therefore, in the case of many proposed class members, individualized determinations would be required to demonstrate income loss, which is key to liability in this case.''[7]

As in *POM Wonderful*, *Werdebaugh* and *Paulsboro*, numerous courts last year closely reviewed the damages evidence offered in support of certification and denied certification where plaintiff's evidence was insufficient to establish that damages could be resolved on a classwide basis.[8] Other courts have granted certifica-

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[2] *Rice v. Sunbeam Prods., Inc.*, No. 2:12-cv-07923 (C.D. Cal. Feb. 14, 2014).

[3] *Rahman v. Mott's LLP*, 13-cv-03482, 2014 BL 339845, at *10 (N.D. Cal. Dec. 3, 2014) (pet. for rev. pending).

[4] *See, e.g., Lilly v. Jamba Juice Co.*, No. 13-cv-02998 (N.D. Cal. Sept. 18, 2014) (denying certification of Rule 23(b)(3) class for damages where there was ''no evidence in the record'' that damages could be resolved using classwide proof); *Dailey v. Groupon, Inc.*, No. 11 C 05685, 2014 BL 237928, at *10 (N.D. Ill. Aug. 27, 2014) (denying certification where plaintiffs ''propose[d] no method for calculating their individualized damages other than having hundreds, or even thousands, of individualized hearings''); *Daniel F. v. Blue Shield of Cal.*, No. 4:09-cv-02037, 2014 BL 225584 (N.D. Cal. Aug. 11, 2014) (denying certification where ''plaintiffs have not offered any proof that damages can be calculated on a classwide basis''); *Cabbat v. Philip Morris USA Inc.*, No. 10–00162, 2014 BL 1807, at *12 (D. Haw. Jan. 6, 2014) (denying certification and observing that ''[o]ther than counsel's bare representations to the Court that Plaintiffs' damages methodology is point-of-purchase and benefit of the bargain, Plaintiffs have provided nothing in the record that 'would enable the court to accurately calculate damages and related penalties for each claim' '') (citing *Comcast*).

[5] *In re POM Wonderful*, No. ML10–02199, 2014 BL 83192, at *1-6 (C.D. Cal. Mar. 25, 2014) (appeal pending).

[6] *Werdebaugh v. Blue Diamond Growers*, No. 12-cv-02724 (N.D. Cal. Dec. 15, 2014).

[7] *In re Paulsboro Derailment Cases*, No. 13–784 (D.N.J Aug. 20, 2014).

[8] *See, e.g., Saavedra v. Eli Lilly & Co.*, No. 2:12-cv-9366 (C.D. Cal. Dec. 18, 2014) (denying certification after analyzing plaintiffs' proposed damages methodology and concluding they ''failed to show that damages could be 'feasibly and efficiently calculated' once liability issues common to the class are decided'') (citation omitted); *Houser v. Pritzker*, No. 10-cv-3105, 2014 BL 192130, at *23-25 (S.D.N.Y. July 1, 2014) (denying certification of damages class where plaintiffs' proposed model was ''vastly overinclusive'' and ''made no attempt whatsoever to separate those class members who are entitled to damages from those who are not''); *Brazil v. Dole Packaged Foods, LLC*, No. 12-cv-01831 (N.D. Cal. May 30, 2014) (denying certification where plaintiff's proposed model failed to provide a means of showing damages on a classwide basis) (appeal pending); *Lanovaz v. Twinings N. Am., Inc.*, No. C–12–02646, 2014 BL 114155, at *7-9 (N.D. Cal. Apr. 24, 2014) (denying certification of damages class after reviewing plaintiffs' proffered damages model and concluding it did not satisfy *Comcast*); *Jones v. Conagra Foods Inc.*, No. C 12-01633 CRB, 2014 BL 164990, at 19-22 (N.D. Cal. June 13, 2014) (denying certification in part because ''[p]laintiffs have not presented an adequate damages model'') (appeal pending);

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tion after such a review, but only if they first determined that plaintiff's classwide evidence did establish damages were amenable to common proof.[9] These decisions again reflect a straightforward application of *Comcast*'s central holding that certification requires proof that damages are amenable to classwide resolution, and one can expect that courts in 2015 will continue to reach similar outcomes when applying that decision.

Some Plaintiffs Need Not Prove Damages Using Classwide Evidence

Notwithstanding *Comcast*, some courts in 2014, often relying on three Circuit decisions entered in 2013,[10] found certification proper even when there were individual questions related to damages.

These cases typically involve questions about the amount of damages that each class member might recover, and not whether each class member suffered any damages at all or was injured, and include cases in which defendant's liability could be bifurcated from the amount of damages and those in which individual damages could be mechanically calculated.

Liability a Common Question, Damages Bifurcatable

Courts this past year have permitted certification despite individual questions about the amount of damages by bifurcating those damages questions from the resolution of defendant's liability. In January, for example, the Fifth Circuit concluded in *Deepwater Horizon* that the lower court had not erred when certifying the question of defendant's liability, which would be resolved before individual damages issues, since those liability questions could be resolved using common proof.[11] Relying on this portion of *Deepwater Horizon*, as well as *Whirlpool* and *Butler*, the Ninth Circuit in *Jiminez v. All-State Insurance Co.* likewise concluded that *Comcast* did not foreclose certification of liability questions, because individual questions about the amount of each class member's damages could be bifurcated and resolved in a later damages stage.[12] Other courts have reached similar conclusions.[13]

In many cases, however, bifurcation will not solve the individual issues raised by damages. The cases that have adopted this approach have been those in which the defendant's liability could be resolved entirely on a classwide basis, because any individual damages issues did not inform the question of liability. By contrast, in cases where plaintiffs must prove they suffered actual damages and injury to establish liability but cannot do so with common proof, bifurcation would not eliminate the need for individual proof during the liability stage.[14]

Moreover, bifurcating damages issues only postpones them, it does not eliminate them altogether, and any individual damages issues must still be resolved before class members could recover. In addition, in some cases, such as *Jiminez*, the court has recognized the need to bifurcate other individual issues such as affirmative defenses:

> the district court was careful to preserve Allstate's opportunity to raise any individualized defense it might have at the damages phase of the proceedings . . . .This split preserved both Allstate's due process right to present individualized defenses to damages claims and the plaintiffs' ability to pursue class certification on liability issues based on the common questions of whether Allstate's practices or informal policies violated California labor law.[15]

Such an approach, however, only increases the number of individual issues left to be resolved after any common phase, thus undermining the extent to which bifurcation advances the litigation. For this reason also, courts should be wary of bifurcation, even if the amount of damages can be bifurcated from liability issues.

Damages Amenable to Mechanical Computation

Courts in 2014 also have concluded that *Comcast* might not defeat class certification when the damages questions go to the amount of damages, and determin-

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Franco v. Connecticut Gen. Life Insur. Co., 299 F.R.D. 417 (D.N.J. 2014) (denying certification where plaintiff's damages methodology could not ''survive the rigorous analysis that *Comcast* held must be applied'') (appeal pending); *Astiana v. Ben & Jerry's Homemade, Inc.*, No. C-10-04387, 2014 BL 3609, at *12-15 (N.D. Cal. Jan. 7, 2014) (denying certification where ''plaintiff has not met her burden of showing that there is a classwide method of awarding relief'').

[9] *See, e.g., Brown v. Hain Celestial Grp.*, No. C 11–03082 (N.D. Cal. Nov. 18, 2014) (observing that ''under *Comcast* and *Leyva*, the plaintiffs must present a damages model that ties damages to their theory of liability,'' before analyzing plaintiffs' model and concluding they ''have adequately shown that damages can be calculated on a classwide basis''); *Guido v. L'Oreal, USA*, No. 2:11–cv–01067 (C.D. Cal. July 24, 2014) (granting certification after reviewing plaintiffs' expert proofs and concluding that plaintiff had ''established a classwide method of calculating relief''); *Ellsworth v. U.S. Bank, N.A.*, No. C12-02506 LB, 2014 BL 195338 (N.D. Cal. June 13, 2014) (granting certification after analyzing plaintiff's expert proofs and concluding they satisfied requirements of *Comcast*); *Algarin v. Maybelline, LLC*, 300 F.R.D. 444, 460 (S.D. Cal. May 12, 2014) (reviewing plaintiffs' damages model before concluding they ''met their burden of showing a classwide method of awarding relief consistent with their theory of liability'').

[10] *In re Whirlpool Corp. Front–Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 851-52 (6th Cir. 2013); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013).

[11] 739 F.3d 790 (5th Cir. 2014).

[12] 765 F.3d 1161 (9th Cir. 2014).

[13] *See, e.g., Brown v. City of Detroit*, No. 10-cv-12162 (E.D. Mich. Dec. 12, 2014) (reading *Whirlpool* and *Comcast* as ''stand[ing] for the proposition that bifurcating the issues of liability and damages is appropriate where it will remedy any problems surrounding individualized proof of damages''); *Nieberding v. Barrette Outdoor Living, Inc.*, No. 12–CV–2353, 2014 BL 248075, at *19-20 (D. Kan. Sept. 8, 2014) (certifying liability questions but bifurcating individual damages questions) (appeal pending); *Houser v. Pritzker*, No. 10-cv-3105, 2014 BL 192130, at *23-25 (S.D.N.Y. July 1, 2014) (denying certification under Rule 23(b)(3) in light of individual issues but certifying liability question and request for injunctive relief).

[14] *See, e.g., Paulsboro Derailment Cases*, 2014 BL 230387, at *14-15 (denying certification of subclass seeking lost income because ''individualized determinations would be required to demonstrate income loss, which is key to liability in this case''); *Franco*, 299 F.R.D. at 430 n.9 (*Deepwater*, *Whirlpool*, *Butler* and *Levya* and the possibility of bifurcating damages did ''not apply to this action, in which Plaintiffs have not demonstrated that liability can be established on a classwide basis'').

[15] *Jiminez v. All-State Insur. Co.*, 765 F.3d 1161 (9th Cir. 2014).

ing those amounts can be computed using some sort of common formula.[16]

These requirements are more likely to be satisfied in certain types of cases, such as wage-and-hour class actions like *Leyva*. By contrast, in consumer fraud or products liability cases, the damages issues are likely to be more complicated. As the court in *Lilly* explained,

> [i]n a wage-and-hour case like *Leyva*, for example, producing a payroll database will likely suffice. But where defendants can make at least a *prima facie* showing that damage calculations are likely to be more complex, expert reports or at least some evidentiary foundation may have to be laid to establish the feasibility and fairness of damage assessments.[17]

Indeed, only a few weeks ago, a federal court in California distinguished *Levya* and *Jiminez* on these grounds, and held in a consumer fraud case that plaintiffs could not avoid *Comcast* without offering sufficient evidence that the alleged classwide damages resulted from defendants' misconduct.[18]

A federal court in Illinois recently distinguished the Seventh Circuit's decision in *Butler* for similar reasons:

> [i]n contrast [to *Butler*], Plaintiffs here propose no method for calculating their individualized damages other than having hundreds, or even thousands, of individualized hearings.[19]

These decisions confirm that, although some cases might present questions about the individual amount of damages that can be resolved with common proof, in many cases those questions will be more complex.

Conclusion

In short, decisions in 2014 have shown the continued importance of *Comcast* and the need for sufficient evidence, at the class certification stage, that shows how damages can be resolved on classwide basis.

Courts should continue to apply this requirement, which is entirely consistent with *Comcast*'s central holding, to class certification motions in 2015.

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[16] *See*, *e.g.*, *Cromeans v. Morgan Keegan & Co.*, No. 2:12–CV–04269, 2014 BL 263440, at *14 (W.D. Mo. Sept. 23, 2014) (finding certification did not fail under *Comcast* where ''calculation of damages is based on a single model applicable to all members of the class'' and ''application of that model to each class member is merely mechanical'') (appeal pending); *Martins v. 3 PD Inc.*, No. 11–11313, 2014 BL 83870, at *13 (D. Mass. Mar. 27, 2014) (''Regardless of the broader implications of the *Comcast* decision, it is inapposite where individual amounts of damages are capable of documentary proof and require only simple arithmetic.''); *Rosales v. El Rancho Farms*, No. 1:09–cv–00707, 2014 BL 25099, at *6 (E.D. Cal. Jan. 29, 2014) (''Since *Comcast* and *Levya*, district courts throughout California have . . . determined that *Comcast* does not defeat class certification where damages are to be calculated based on the wages each employee lost due to the defendant's unlawful practices.'').

[17] *Lilly*, 2014 BL 259776, at *11-13.

[18] *Werdebaugh*, No. 12–CV–02724.

[19] *Dailey*, 2014 BL 237928, at *10; *see also*, *e.g.*, *Slapikas v. First Am. Title Co.*, 298 F.R.D. 285 (W.D. Pa. 2014) (decertifying class where ''[i]ndividualized fact finding will also be required to determine damages across the class, which is incompatible with *Comcast*'s requirement that plaintiffs provide a system for finding damages that does not include individual fact finding'') (appeal pending).

   ISSN 1529-0115