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SUPREME COURT

CERTIFICATION

Sidley Austin LLP attorneys Joel S. Feldman and Daniel R. Thies explore *Comcast Corp. v. Behrend*'s impact on class certification decisions. They conclude that, after *Comcast*, courts are more receptive to looking at individualized damages in deciding whether to certify, and courts should perform a rigorous analysis and examination of evidence in the predominance analysis for certification.

***Comcast's* Lasting Impact: Crystallization and Affirmation of the Rule 23(b)(3) Predominance Requirement**



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Has *Comcast Corp. v. Behrend*, 81 U.S.L.W. 4217, 2013 BL 80435 (U.S. March 27, 2013), altered the landscape for treatment of class actions in federal courts? The Court articulated a broad holding regarding the type of evidence a plaintiff must present to prove that damages can be determined on a classwide basis. The dissent, however, stated that the majority opinion did not alter the law, and lower courts, since *Comcast*, have continued this divide.

The stakes are high. Whether to certify a lawsuit as a class action is often a critical, if not outcome-determinative ruling. Any change in how courts determine whether a lawsuit should be certified for class treatment thus has a significant impact on what typically are the largest contingent liability lawsuits in the United States.

We have examined every opinion that has cited *Comcast* in its analysis of whether to certify a class action. The results are surprising. They reveal that whether *Comcast* changed the law is largely a side issue for now, because it undeniably has broadly affected how courts apply the law. First, *Comcast* has affected how courts examine damages in the "predominance" analysis of Rule 23(b)(3). Many courts that previously overlooked or ignored evidence about damages now analyze whether that evidence is so individualized that it overwhelms common issues.

Second, *Comcast* has changed how some courts approach the standard for Rule 23(b)(3) predominance.

While *Comcast* was a damages case, courts have cited *Comcast's* legal standard—an examination of evidence as part of a rigorous analysis—when also analyzing liability elements and affirmative defenses. *Comcast* has thus changed how courts balance individualized versus common evidence not just for damages, but for the entirety of a lawsuit.

This article begins with a summary of how federal courts treated the damages issues when analyzing class certification before *Comcast*. We follow with a review of the *Comcast* opinion, and then analyze its impact on how courts approach the question of class certification.

I. Individualized Damages Issues Before *Comcast*

Federal courts have long disagreed over how, if at all, individualized damages affect Rule 23(b)(3)'s requirement that common issues predominate over individualized issues. The rule requires that “questions of law or fact common to class members predominate over any questions affecting only individual members.” On its face, the rule does not distinguish between liability and damages issues. A purely textual reading of Rule 23(b)(3) thus indicates that predominance should encompass both liability and damages and, depending on the circumstances, individualized issues arising from damages alone, liability alone, or both could overwhelm common issues.

Prior to *Comcast*, however, federal courts were all over the map regarding the effect of individualized damages on a plaintiff's ability to satisfy the predominance requirement. Some courts found that individualized damages alone could preclude class certification when the issue made classwide adjudication unmanageable. For example, the Fifth Circuit explained that “[c]lass treatment . . . may not be suitable where the calculation of damages is not susceptible to a mathematical or formulaic calculation, or where the formula by which the parties propose to calculate individual damages is clearly inadequate.”¹ The Eighth and Fourth Circuits adopted a similar position, finding that individualized evidence of damages could be enough, by itself, to defeat Rule 23(b)(3) predominance.²

Other courts held that individualized damages had no impact on Rule 23(b)(3) predominance.³ Most notably, the Ninth Circuit ruled that “[t]he potential existence of individualized damage assessments . . . does not detract from the action's suitability for class certification” because “[t]he amount of damages is invariably an individual question.”⁴ Other circuits likewise found that

individualized damages do not detract from a plaintiff's ability to satisfy predominance.⁵

The pre-*Comcast* confusion over what role damages can play in the predominance analysis is best exemplified by divergent rulings within the same district court. For example, in 1996 a district court in Kansas refused to certify a class in the presence of individualized damages.⁶ Just over a decade later, the same court cited the opposite rule that “[t]he possibility that individual issues may predominate the issue of damages . . . does not defeat class certification.”⁷

In sum, prior to *Comcast*, there was major divergence, if not confusion, in the federal courts on the role damages should play in determining whether a plaintiff had met its burden of demonstrating the predominance of common factual issues.

II. The Supreme Court's Decision in *Comcast v. Behrend*

The Supreme Court tried to bring some clarity to the damages question in *Comcast Corp. v. Behrend*.⁸ In *Comcast*, the court evaluated a class of approximately two million cable television subscribers alleging antitrust violations. The district court and Third Circuit certified the class, but upheld only one of four of the plaintiffs' theories of antitrust impact. The District Court further found that damages resulting from the antitrust impact could be calculated on a classwide basis. Plaintiff's damages expert report, however, did not limit its analysis to the sole antitrust impact theory upheld by the Court.⁹

The Supreme Court's analysis proceeded in two steps. First, the Court addressed the legal standard for determining whether plaintiff satisfied Rule 23(b)(3)'s predominance standard. The Court noted that its prior recitations of a rigorous analysis standard involved Rule 23(a).¹⁰ The Court then expressly expanded the rigorous analysis standard to encompass 23(b) as well: “The same analytical principles govern Rule 23(b). If anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a).”¹¹

The Court then proceeded to apply the rigorous analysis standard to the facts before it. It found that the Third Circuit's failure to entertain arguments about the propriety of plaintiff's damages model meant that plaintiffs fell “far short of establishing that damages are capable of measurement on a classwide basis.”¹² Absent a viable, classwide damages theory, “[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class.”¹³

The dissent in *Comcast* downplayed the significance of the ruling. The dissent found that the majority's opinion “breaks no new ground on the standard for certify-

¹ *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 307 (5th Cir. 2003).

² *Blades v. Monsanto Co.*, 400 F.3d 562, 570-71 (8th Cir. 2005); *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir. 1998).

³ Still other circuits staked out the middle ground; they found that sometimes individualized damages could preclude predominance, and other times not. See, e.g., *Arreola v. Godinez*, 546 F.3d 788, 801 (7th Cir. 2008); *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564 (6th Cir. 2007); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 139-40 (2d Cir. 2001).

⁴ *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1089 (9th Cir. 2010) (quoting *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975)).

⁵ See, e.g., *Chiang v. Veneman*, 385 F.3d 256, 273 (3d Cir. 2004) (citation omitted); *Smilow v. SW Bell Mobile Sys., Inc.*, 323 F.3d 32, 40 (1st Cir. 2003).

⁶ *Schreiber v. NCAA*, 167 F.R.D. 169, 177 (D. Kan. 1996).

⁷ *In re Urethane Antitrust Litig.*, 251 F.R.D. 629, 633, 639 (D. Kan. 2008).

⁸ 81 U.S.L.W. 4217, 2013 BL 80435 (U.S. March 27, 2013).

⁹ *Id.* at ***3.

¹⁰ *Id.* at ***5.

¹¹ *Id.*

¹² *Id.* at ***5.

¹³ *Id.*

ing a class-action” and “should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable on a classwide basis.”¹⁴

III Comcast Impact No. 1: Courts Are More Receptive to Looking at Individualized Damages in Deciding Whether to Certify

Comcast recites the predominance standard from a manageability perspective: can the case be fairly tried with common evidence or will the individualized issues that must be resolved “overwhelm questions common to the class?” It then applied this standard to the damages segment of the case. By grafting the predominance standard onto damages, *Comcast* elevated the examination of damages evidence as part of the predominance analysis.

A. Courts That Previously Discounted Damages Now Examine Damages Evidence. The first impact of *Comcast*—that damages are fair game in the predominance analysis—is most starkly highlighted by examining class certification rulings from the Ninth Circuit. Pre-*Comcast*, district courts in the Ninth Circuit were bound by *Yokoyama*’s comments that “[t]he potential existence of individualized damage assessments . . . does not detract from the action’s suitability for class certification.”¹⁵ *Comcast* changed all that. Courts in the Ninth Circuit now cite to *Comcast* as a basis to examine the evidence applicable to damages and, at times, deny class certification based on individualized damages.

For example, in *Wheeler v. United Services Automobile Association*,¹⁶ plaintiff moved to certify a class of insureds who allegedly were entitled to more attorneys’ fees as part of their settlement of insurance claims. Citing to Ninth Circuit precedent, plaintiff asserted that individualized damages “does not defeat class action treatment.”¹⁷ The district court, however, noted that “*Comcast* instructs that the predominance requirement of Rule 23(b)(3) cannot be met [when] individual damage calculations will inevitably overwhelm questions common to the class.” The court then denied class certification, finding that the individualized evidence necessary to determine damage precluded plaintiff from satisfying the Rule 23(b)(3) predominance requirement.¹⁸

Another district court in the Ninth Circuit quoted *Yokoyama*’s broad statement that individualized damages are permissible under Rule 23(b)(3).¹⁹ But it went on to find that, under *Comcast*, a plaintiff could satisfy the predominance standard only upon demonstrating that damages could be determined on a classwide basis. The court held that the individualized damages inquiry made class certification inappropriate because the dam-

ages portion of the case was “not capable of proof at trial through evidence common to the class.”²⁰

Similarly, in *Guido v. L’Oreal, USA, Inc.*,²¹ the Central District of California invoked *Comcast*’s requirement that a plaintiff present a damages methodology that can be determined with classwide evidence. Plaintiff’s failure to do so meant that the proposed class could not satisfy the predominance requirement.²² Finally, the court in *Forrand v. Federal Express Corp.*, invoking *Comcast*’s requirement that plaintiff present evidence regarding damages that can be applied classwide, found that plaintiff could not satisfy Rule 23(b)(3) predominance.²³

Cases from the Third Circuit also demonstrate this point. Prior to *Comcast*, the Third Circuit had ruled “that the necessity for calculation of damages on an individual basis should not preclude class determination”²⁴ Yet in *Slapikas v. First Am. Title Ins. Co.*, the Western District of Pennsylvania denied class certification because evidence of damages was individualized, “which is incompatible with *Comcast*’s requirement” that damages assessments not involve individual fact finding.²⁵ Other district courts in the Third Circuit have also denied class certification because of individualized damages after citing to the *Comcast* rule.²⁶

The foregoing cases provide a clear example of *Comcast*’s impact on class certification. Prior to *Comcast*, the Ninth Circuit’s *Yokoyama* opinion and the Third Circuit’s *First American* opinion instructed district courts to ignore individualized damages when considering class certification. Now, not only do courts consider the damages evidence, they also at times deny class certification based on the individualized nature of the claimed damages.

B. Post-Comcast Rulings That Certify Classes Confirm the Impact of Comcast on Examination of Damages Evidence. The effect of *Comcast* is clear even in opinions that certify a class. The key to these cases is not the finding that the class qualified for certification, but rather that the court examined the nature of the evidence applicable to damages as part of its rigorous analysis on the predominance issue. In many of these cases the courts uphold class certification because, after considering the damages evidence, they find they are manageable on a classwide basis.

Illustrative are the Sixth and Seventh Circuit rulings in a pair of consumer fraud class actions involving allegedly defective washing machines. In both cases the Supreme Court had told the courts to reconsider their earlier certification of classes in light of *Comcast*, and in both cases the courts stood by their earlier rulings.

²⁰ *Id.* at *6.

²¹ No. CV 11-1067, 2013 U.S. Dist. LEXIS 94031 (C.D. Cal. July 1, 2013).

²² *Id.* at *42-43, 45.

²³ No. CV 08-1360, 2013 BL 147574 (C.D. Cal. Apr. 25, 2013).

²⁴ *Chiang*, 385 F.3d at 273 (citation omitted).

²⁵ No. 06-0084, 2014 BL 63287, at *16 (W.D. Pa. Mar. 7, 2014).

²⁶ See, e.g., *Bright v. Asset Acceptance, LLC*, 292 F.R.D. 190, 201-02 (D.N.J. 2013); *Martin v. Ford Motor Co.*, 292 F.R.D. 252, 274 (E.D. Pa. 2013).

¹⁴ *Id.* at ***9 (Ginsburg & Breyer, JJ., dissenting) (internal quotation marks and citation omitted).

¹⁵ *Yokoyama*, 594 F.3d at 1089.

¹⁶ No. 11-cv-00018, 2013 BL 228368 (D. Alaska Aug. 27, 2013).

¹⁷ *Id.* at *4.

¹⁸ *Id.* at *6.

¹⁹ *Gooden v. SunTrust Mortg., Inc.*, No. 2:11-cv-02595, 2013 BL 342689, at *5 (E.D. Cal. Dec. 11, 2013).

The Sixth Circuit opinion²⁷ largely avoids the issue, but the Seventh Circuit opinion²⁸ vividly demonstrates *Comcast's* effect on the examination of evidence applicable to damages. The Seventh Circuit found that each individual class member's damage could "be readily determined in individual hearings . . ." ²⁹ The court also noted that the damages hearings "would be brief."³⁰ Whether the court's conclusion was correct or not is not the point here; what matters is that the court considered how damages issues could be resolved rather than brushing the issue aside.

The importance of damages in the certification analysis was further confirmed in *Parko v. Shell Oil Co.*,³¹ another Seventh Circuit opinion vacating class certification based on *Comcast*. In *Shell Oil*, the Seventh Circuit vacated class certification because plaintiff's damages model was suspect, and it was "difficult to see" how the individualized damages "can be managed in the class action format."³²

The Ninth Circuit's opinion in *Leyva v. Medline Indus. Inc.*,³³ which cited *Comcast* as a basis to uphold class certification, is also illustrative.³⁴ *Leyva* analyzed the evidence a court would examine to determine each class member's damages. It noted that the defendant's electronic payroll records contained much of the evidence necessary and that other evidence could be obtained by a query of a computerized timekeeping database. The Ninth Circuit thus concluded: "Here, unlike in *Comcast* . . . [defendant's] computerized payroll and time-keeping database would enable the court to accurately calculate damages and related penalties for each claim."³⁵

Two noteworthy opinions from district courts in California also document this point. In *Schramm v. JPMorgan Chase Bank, N.A.*, the court began by stating that "*Comcast* did not alter the evidentiary requirements for class certification under Fed. R. Civ. P. 23(b)(3)."³⁶ It then examined the damages evidence, and found that determining damages was nothing more than a "uniform and mechanical" calculation from defendant's re-

ords.³⁷ Similarly, in *Munoz v. PHH Corp.*, the court invoked *Comcast*, examined the damages evidence, and upheld class certification. Critically, the court found that all damages evidence was "susceptible to class-wide proof," and that damages could be determined from the records available from the defendant.³⁸

The *Sears Roebuck*, *Shell Oil*, *Medline*, *JP Morgan* and *PHH* cases all exhibit the same point: rather than ignore damages or discount its importance, courts now examine the evidence necessary to prove damages as part of the predominance analysis. If damages computations are formulaic and the records of a company provide the underlying data, then the damages evidence does not undermine class certification. But if assessing damages requires individualized evidence that interferes with the manageability of a trial, then individualized damages evidence alone can preclude a plaintiff from satisfying Rule 23(b)(3) predominance.

IV. *Comcast* Impact No. 2: The Necessity of a Rigorous Analysis and Examination of Evidence in the Predominance Analysis

While *Comcast* was a damages case, the phraseology of the legal standard it articulated for predominance applies universally. A review of cases that cite *Comcast* reveals that its standard for predominance, applying a rigorous analysis and examining the evidence to determine whether it is uniform or individualized, has been invoked by courts when examining liability elements and affirmative defenses. *Comcast's* lasting impact is accordingly applying this legal standard to the entirety of the case to determine whether uniform evidence allows a court to try the case in an efficient and manageable manner.

Perhaps the best example is the Eighth Circuit opinion in *Halvorson v. Auto-Owners Insurance Co.*³⁹ The Eighth Circuit began its class certification analysis by citing *Comcast's* ruling on predominance, noting that the Supreme Court had found that individualized damages issues precluded the plaintiff from satisfying predominance.⁴⁰ The court went on to find, based on its analysis of the evidence, that individualized questions about breach of contract and bad faith liability issues, not damages issues, predominated over any common evidence.⁴¹ The Eighth Circuit thus invoked *Comcast's* standard of looking to evidence to determine whether the individualized issues overwhelm common items and applied that standard to liability elements.

Another excellent example is the Northern District of Texas opinion in *In re Kosmos Energy Ltd. Securities Litigation*.⁴² In *Kosmos Energy*, the plaintiff argued that liability issues were not subject to *Comcast's* "exacting standard for predominance under Rule 23(b)(3)."⁴³ The district court retorted:

The Supreme Court has announced a clear directive to plaintiffs seeking class certification—in any type of case—

²⁷ *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013).

²⁸ *Butler v. Sears Roebuck & Co.*, 277 F.3d 796 (7th Cir. 2013).

²⁹ *Id.* at 801.

³⁰ *Id.* at 798.

³¹ 739 F.3d 1083 (7th Cir. 2013).

³² *Id.* at 1087.

³³ 716 F.3d 510 (9th Cir. 2013).

³⁴ Another appellate court decision has stated that it is "a misreading" of *Comcast* to interpret it as precluding certification "in any case where the class members' damages are not susceptible to a formula for classwide measurement." *In re Deepwater Horizon*, 739 F.3d 790, 815 (5th Cir. 2014). *Deepwater Horizon*, however, dealt with the certification of a settlement class in which the defendant had agreed to a series of individualized hearings to determine the damages of individuals and business harmed by a massive oil spill on the Gulf Coast. The court did not grapple with the question of whether certifying a class with significant individualized issues for litigation purposes (as opposed to settlement) would satisfy Rule 23(b)(3) or would impinge on a defendant's due process rights to examine each of the individual class members about damages.

³⁵ *Leyva*, 716 F.3d at 514.

³⁶ No. CV09-09442, 2013 WL 7869379, at *6 (C.D. Cal. Dec. 13, 2013).

³⁷ *Schramm*, 2013 WL 7869379, at *6.

³⁸ No. 08-cv-07599, 2013 BL 128109, at *18 (E.D. Cal. May 14, 2013).

³⁹ 718 F.3d 773 (8th Cir. 2013).

⁴⁰ *Id.* at 778.

⁴¹ *Id.* at 779.

⁴² No. 12-cv-373, 2014 BL 81292 (N.D. Tex. Mar. 19, 2014).

⁴³ *Id.* at *15.

that they will face a ‘rigorous analysis’ by the federal courts, will not be afforded favorable presumptions from the pleadings or otherwise, and must be prepared to prove with facts—and by a preponderance of the evidence—the requirements of Rule 23.⁴⁴

Numerous other cases have invoked the *Comcast* standard and, by examining the evidence the parties would need to prove their claims, denied class certification by finding that the individualized evidence overwhelms any common issues.

The same applies to affirmative defenses. It has long been the case that the predominance analysis includes not only liability elements, but also affirmative defenses.⁴⁵ The *Comcast* requirement of examining evidentiary submissions to determine if uniform evidence can resolve the case thus also applies to the evidence necessary to determine the outcome of affirmative defenses.

*Fields v. Mobile Messengers America, Inc.*⁴⁷ is illustrative. The court in *Fields* first recited the *Comcast* standard for evaluating predominance, noting that plaintiff has an “evidentiary burden under Rule 23(b)”⁴⁸ It then denied class certification due to plaintiff’s failure to satisfy predominance, and did so by applying the *Comcast* standard to an affirmative defense. “Thus, even if consent is an affirmative defense, individualized inquiries regarding consent remain. Plaintiffs have failed to prove predominance under Rule 23(b) and their motion to certify a nationwide class is . . . hereby denied.”⁴⁹ Other courts similarly have found that “[affirmative] defenses must be subjected to the same rigorous inquiry” as elements of plaintiffs’ claims.⁵⁰

Comcast’s application of the rigorous analysis test, with the requirement that plaintiff establish Rule 23 elements by a preponderance of the evidence, can be viewed as merely repeating the rule of law announced in *Wal-Mart*. *Wal-Mart* also required a rigorous class certification analysis with examination of relevant evidence.⁵¹ But *Wal-Mart* was a Rule 23(a) commonality case and never addressed whether the same standard also applied to Rule 23(b)(3). Indeed, some courts noted that *Wal-Mart*, because it was a Rule 23(a) and (b)(2) case, left open the question of whether 23(b)(3) predominance was subject to the same rigorous analysis.⁵²

Comcast resoundingly answers that question in the affirmative. The Supreme Court, after noting that it re-

cited the rigorous analysis standard in *Wal-Mart* as applied to Rule 23(a), declared that “[t]he same analytical principles govern Rule 23(b).”⁵³ *Comcast* thus requires that all aspects of a lawsuit—liability, affirmative defenses and damages—are subject to a rigorous analysis with examination of evidence, rather than just pleadings or legal theories, to determine whether the case can be tried on a classwide basis.

This, in our judgment, is *Comcast*’s most lasting impact: that a court must analyze the predominance test by assessing the evidence that will be presented for the case in its entirety. At times, individualized damages evidence alone could preclude certification; at times, the evidence applicable to liability or affirmative defenses alone could do so; and at times, it could be a combination of issues demonstrating that individualized evidence precludes the ability to efficiently try the case in a manageable manner.

The foregoing impact of *Comcast* has many implications, some self-evident and some not. We discuss two major implications below.

A. Courts Can No Longer Say ‘Let’s Certify Today and Re-examine Class Certification Later.’ Class certification is an inherently provisional ruling. Prior to *Comcast*, however, some courts failed to rigorously examine the class issue; they punted. They would either accept the allegations of the complaint or minimally investigate, certify, and invite the parties to come back later to re-examine the class issue upon a more developed record.⁵⁴ This approach no longer works. So long as evidence material to class certification is presented, the court must engage in a rigorous analysis in order to determine whether the evidence necessary to try the case is uniform enough to allow for a manageable trial.

A variant of the “certify now, examine later” approach is to look at liability only and certify if liability issues involve uniform evidence, but then examine damages at a later date. *Comcast* precludes this approach as well. As previously discussed in Section III, *Comcast* requires courts to examine the evidence applicable to damages as part of the predominance analysis. The *United Services, Sun Trust, L’Oreal, First American Title* and *Shell Oil* cases all hold that a court must look at the evidence necessary to prove damage as part of its predominance analysis, and cannot push back the damages analysis for a later day.⁵⁵

The Eleventh Circuit recently reiterated this point in *Bussey v. Macon County Greyhound Park, Inc.*⁵⁶ The district court in *Macon County* found shortcomings with respect to the evidence applicable to damages, but decided to certify and look at those shortcomings at the merits stage of the case.⁵⁷ In reversing, the Eleventh Circuit noted that the district court had cited *Comcast*, but failed to conduct the rigorous analysis that *Comcast* requires, “instead deferring resolution of important questions bearing on the class certification analysis”

⁴⁴ *Id.* at *16 (emphasis in original).

⁴⁵ See, e.g., *Tracy v. NVR, Inc.*, 293 F.R.D. 395, 400 (W.D.N.Y. 2013); *Britt Green Trucking v. FedEx Nat’l LTL, Inc.*, No. 09-cv-445, 2013 BL 317260, at *8 (M.D. Fla. Nov. 15, 2013); *Pollock v. Energy Corp. of Am.*, No. 10-1553, 2013 WL 5338009, at *12 (W.D. Pa. Sept. 16, 2013).

⁴⁶ See, e.g., *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000) (“[W]e regard the law as settled that affirmative defenses should be considered in making class certification decisions.”).

⁴⁷ No. 12-05160, 2013 BL 319367 (N.D. Cal. Nov. 18, 2013).

⁴⁸ *Id.* at *5.

⁴⁹ *Id.* at *5.

⁵⁰ *Barfield v. Sho-Me Power Elec. Co-op*, No. 11-cv-4321, 2013 BL 197760, at *14 (W.D. Mo. July 25, 2013) (citation omitted); see also *Turnbow v. Life Partners, Inc.*, No. 11-cv-1030, 2013 WL 3479884, at *15 (N.D. Tex. July 9, 2013).

⁵¹ *Wal-Mart Stores, Inc. v. Dukes*, 79 U.S.L.W. 4527, 2011 BL 161238 (U.S. June 20, 2011).

⁵² E.g., *Driver v. AppleIllinois LLC*, No. 06-cv-6149, 2012 BL 50410, at *2 (N.D. Ill. Mar. 2, 2012).

⁵³ *Comcast*, 2013 BL 80435, at ***1.

⁵⁴ See, e.g., *Daffin v. Ford Motor Co.*, 458 F.3d 549, 554 (6th Cir. 2006); *Perez-Farais v. Global Horizons, Inc.*, No. 05-3061, 2006 BL 142622 (E.D. Wash. July 28, 2006); *Maywalt v. Parker & Parsley Petroleum Co.*, 147 F.R.D. 51, 57-58 (S.D.N.Y. 1993).

⁵⁵ See text, *supra*, at notes 16-32.

⁵⁶ No. 13-12733, 2014 BL 89696 (11th Cir. Apr. 2, 2014).

⁵⁷ *Williams v. Macon County Greyhound Park, Inc.*, No. 10-cv-191, 2013 U.S. Dist. LEXIS 45355, at *23-24 (M.D. Ala. Mar. 29, 2013).

. That failure cannot be overlooked, because the shortcomings and the data are significant and bear directly on the issue of predominance.”⁵⁸

In sum, if a defendant submits evidence material to the issue of determining damages, under *Comcast* a court must examine that evidence in deciding class certification.

B. Class Certification Can Be Denied Even if Some Issues Are Common Elements. Prior to *Comcast*, some courts granted class certification upon the finding that certain liability elements were common, without a rigorous analysis of the evidence applicable to *all* liability elements, affirmative defenses and damages.⁵⁹ *Comcast*, however, alters that analytical framework. As previously noted, *Comcast* requires examination of the predominance requirement by looking at the case in its entirety. This means there could be uniform evidence applicable to certain elements of a case, whether liability, affirmative defenses or damages; but individualized evidence, applicable to other elements may overwhelm the common issues.

Other courts, prior to *Comcast*, found that a plaintiff failed to satisfy the Rule 23(b)(3) predominance requirement despite showing that certain aspects of the case could be resolved through uniform evidence. For example, the Eighth Circuit in *In re St. Jude Med., Inc.*,⁶⁰ noted that “[w]e recognize that plaintiffs may present certain issues that are common to all of their claims” It nonetheless denied class certification be-

cause the individualized issues precluded plaintiffs from satisfying predominance and presenting the trial in a manageable way. The Second Circuit similarly ruled in the *McLaughlin v. American Tobacco Co.*⁶¹

Comcast makes this rule universal: class certification can be denied upon the finding of some common elements, because it requires courts to apply the predominance standard to the evidence that the parties would present for the entirety of the case.⁶² *Comcast* also precludes the opposite: no longer can a court certify a class action, because some elements, even if major, are common, without looking at the totality of the evidence necessary to determine liability, affirmative defenses and damage. So long as certain aspects of the case, whether liability, affirmative defenses, damage or a combination thereof, require resorting to individualized evidence, making the trial unmanageable, then *Comcast* requires the denial of class certification.

⁶¹ 522 F.3d 215, 223 (2nd Cir. 2008) (“[P]roof of misrepresentation even widespread and uniform misrepresentation only satisfies half of the equation; the other half, reliance on a misrepresentation, cannot be the subject of genuine proof.”). Numerous district courts similarly ruled. *See, e.g., Rowe v. Bankers Life & Cas. Co.*, No.09-cv-491, 2012 BL 74781, at *12 (N.D. Ill. Mar. 29, 2012) (despite finding numerous issues that “could be proven with class-wide evidence,” court denies class certification based on other individualized issues); *Faktor v. Lifestyle Lift*, No. 09-cv-511, 2010 BL 8786 (N.D. Ohio Jan. 15, 2010) (same); *Walsh v. Principal Life Ins. Co.*, 266 F.R.D. 232, 259, 256 (S.D. Iowa 2010) (even though plaintiff could prove fiduciary status and ill-gotten profits with common evidence, issues of causation and reliance precluded class certification).

⁶² *See, e.g., Cabbat v. Philip Morris USA Inc.*, Civil No. 10-00162, 2014 BL 1807 (D. Hawaii Jan. 6, 2014) (despite some common elements, under *Comcast*, class certification denied); *Bruce v. Teleflora, LLC*, No. 13-cv-03279, 2013 BL 349037 (C.D. Cal. Dec. 18, 2013) (same).

⁵⁸ *Bussey*, 2014 BL 89696, at *7.

⁵⁹ *See, e.g., Brown v. Kelly*, 609 F.3d 467, 484-85 (2d Cir. 2010); *Wren v. RGIS Inventory Specialists*, 256 F.R.D. 180, 204-05 (N.D. Cal. 2009); *Riordan v. Smith Barney*, 113 F.R.D. 60, 65 (N.D. Ill. 1986).

⁶⁰ 522 F.3d 836, 841 (8th Cir. 2008).