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Life After Comcast: Reasonable Interpretations Preserve the Rule and Keep Class Actions Alive

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Life after Comcast: Reasonable Interpretations Preserve the Rule and Keep Class Actions Alive

I. Introduction

Over the past few years, the United States Supreme Court has consistently interpreted Federal Rule of Civil Procedure 23 – the rule that governs the formation of class actions in the federal courts – narrowly. The trend to place serious limitations on class action through the Court’s strict interpretation of Rule 23 began over a decade ago with the Supreme Court’s decision in Amchem Products v. Windsor. More recently, the Supreme Court has focused on the individual elements of Rule 23 to make class certification more difficult.

While courts have been making class certification more difficult at almost all phases of the Rule 23 analysis, this article will focus on class formation under Rule 23(b)(3) and the increased judicial scrutiny of the requirements set forth in that section. In practice, judicial skepticism takes the form of both class rejection based on individual issues without regard for whether those individual issues predominate the litigation, as

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1 See 521 U.S. 591 (1997). Amchem began the class action revolution as we know it, but the real crackdown began in 2010 when the Supreme Court barred nearly all arbitral classes, as well as classes rooted in consumer or employment contracts. See generally Stolt-Nielsen S.A. v. Animalfeeds Int’l Corp., 130 S. Ct. 1758 (2010); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011). This article will focus on the most recent Supreme Court decisions that restrict the class action device by heightening the standard for nearly every required element for certification and the responses of lower federal courts to these rulings.

2 See Symposium, The Future of Class Actions: The Decline of Class Actions, 90 Wash. U. L. Rev. 729, 731 (2013). This article will not specifically address the implications of increased scrutiny under Rule 23(a); however, the analysis under Rule 23(a) provides useful insight as the court has held that similar, more stringent standards and burdens apply under Rule 23(b). See Part III below, infra.
Rule 23(b)(3) requires on its face, and requirements that proof of injuries and damages be common to all class members. The Supreme Court has addressed the issue of predominance by supporting a more strict review of the claims and evidence at class certification stage; however, the extent of that review is uncertain. As it stands, the Supreme Court’s rule on the appropriateness of a class certification under Rule 23(b)(3) in any given case is susceptible to three different interpretations. One approach to class certification under Rule 23(b)(3) stems from the broadest interpretation of the Court’s ruling in Comcast v. Behrend and requires plaintiffs seeking class formation to prove common damages capable of proof on a class-wide basis at the certification stage. The second approach acknowledges that the Court created a more demanding standard in Comcast, but limits the new test to cases involving antitrust litigation. The third, and final approach attaches significance to the reasoning and underlying

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3 Ignoring the relationship between individual issues and class-wide claims is just one of the many ways courts have begun to dispense with class action lawsuits. Symposium, supra note 2, at 733.


6 In the wake of Comcast, some courts have looked to Rule 23(c)(4) of the Federal Rules of Civil Procedure to avoid the issue of damages. The Rule provides, in pertinent part, “when appropriate, an action may be maintained as a class action with respect to particular issues.” Fed. R. Civ. P. 23(c)(4). Many courts have interpreted Rule 23(c)(4) as allowing class certification for the sole purpose of determining liability. See In re Motor Fuel Temperature Sales Practices Litig., 2013 U.S. Dist. LEXIS 50667 (D. Kan. Apr. 5, 2013); Miri v. Dillon, U.S. Dist. LEXIS 68211 (E.D. Mich. May 14, 2013). Although federal courts have already begun to use, and likely continue to use, Rule 23(c)(4) as a tool to avoid the ambiguities of Comcast, this approach is outside of the scope of this paper.


8 The reasons for adopting a bifurcated test for Rule 23(b)(3) class actions based on the substantive claim of the class are rooted in the liability that attaches to certain types of litigation and is addressed Part III below, infra.
principles of Comcast but does not formally apply any heightened standard of proof for damages, or predominance generally, at the class certification stage.  

II. Background


In federal court, Federal Rule of Civil Procedure 23 governs the formation of a class for class action lawsuit purposes. Rule 23 sets forth the requirements for class certification in a two-prong test. The first prong, Rule 23(a), sets forth four prerequisites that must be satisfied in every class action case: numerosity, typicality, commonality, and adequacy of representation. Rule 23(a) is a conjunctive test, that is, each of the four elements is a prerequisite to class certification. The numerosity requirement generally requires the number of plaintiffs to be so numerous that litigating each of their claims individually would be impractical. The requirement of commonality ensures that the issues to be settled are common to the class. The last two requirements relate to the representation of the class in that the representative parties must not only

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9 This is the most conservative approach, as far as judicial philosophies go, and finds support in the limiting language of the Comcast majority’s opinion as well as other Supreme Court cases interpreting the standards of proof at the class certification stage. See Part III below, infra.
10 Many class action lawsuits are brought in state court because state courts are thought to be more plaintiff friendly; however this article will focus on class action litigation in the federal courts, thus state laws regarding certification are not relevant to this analysis.
13 The numerosity requirement has efficiency undertones as it relates the practicality, or rather impracticality of suing as an individual as opposed to as a class. Fed. R. Civ. P. 23(a)(1)
represent the claims and defenses of the entire class\textsuperscript{15}, but also adequately protect interests common to the class throughout litigation.\textsuperscript{16}

The second prong of Rule 23 is disjunctive; a class may be certified under any one of the three standards prescribed in the rule.\textsuperscript{17} Rule 23(b) enumerates three permissible forms of classes under this second prong of the class action formation test.

First, Rule 23(b)(1) allows for class certification in cases in which

prosecuting separate actions by or against individual class members

would create a risk of: (a) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (b) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.\textsuperscript{18}

Second, Rule 23(b)(2) provides for class certification if any party opposing certification has “acted or refused to act on grounds that apply generally to the class.”\textsuperscript{19} Lastly, Rule 23(b)(3) requires that “the question of law or fact common to the class members predominate over any questions affecting only individual members” in order for a class

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\textsuperscript{15} Fed. R. Civ. P. 23(a)(3).
\textsuperscript{16} Fed. R. Civ. P. 23(a)(4). These last two provisions are more about protecting the individuals of the class, than administrative efficiency; however, the two are related in the sense that representation issues affect the effectiveness of the class action as a litigation device. Fed. R. Civ. P. 23(a)(3)-(4).
\textsuperscript{17} Fed. R. Civ. P. 23(b) (“Types of Class Actions. Class action may be maintained if Rule 23(a) is satisfied and if” one of the three following is true).
\textsuperscript{18} Fed. R. Civ. Pro. 23(b)(1).
\textsuperscript{19} Fed R Civ P. 23(b)(2); See also Wal-Mart Stores, Inc. v. Duke, 131 S. Ct. 2541 (2011).
\end{flushleft}
to be certified. Federal Rule of Civil Procedure 23 includes four factors that may be relevant to determining whether a class is certifiable under 23(b)(3): (a) class member’s interest in individual action; (b) extent and nature of the litigation that has already began; (c) desirability v. undesirability of litigating claims in a particular forum; and (d) difficulties likely to arise. While none of the decisions addressed in this article specifically consider these factors, the principles clearly run through each decision and justification. The fourth factor, which considers difficulties likely to arise due to litigating as a class, gets right at the heart of the dispute in the most current Rule 23(b)(3) certification cases.

B. Creating Substantial Barriers: The Supreme Court’s Modern View of Class Action Lawsuits

The Supreme Court of the United States, and federal courts generally, has read the requirements of Rule 23 very narrowly over the past several decades, thus increasing the burden on class action plaintiffs at the certification stage. Just in the last several years, the Supreme Court has delivered some huge blows to class action plaintiffs. Amchem Products v. Windsor is a prime example of a case with severe consequences for class action plaintiffs and the certification of a class generally. The proposed class in Amchem would have represented all current and future claimants of

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20 Fed R Civ Pro 23(b)(3); see Amgen, 133 S. Ct. at 1191. “Since Rule 23(b)(3) was amended in 1966 to broaden the availability of class actions, the vast majority of certification applications have been made under this rule.” Cavanagh, supra note 4, at 157.
22 This article considers whether the consideration of “difficulties likely to arise” in litigation requires Plaintiff’s to prove an injury attributable to the class and a common methodology for measuring class-wide damages at the class certification stage.
23 Amchem Prods. v. Windsor, 521 U.S. 591 (1997); see also Symposium, supra note 2, at 733-34.
asbestos-related diseases upon certification.\textsuperscript{24} In \textit{Amchem}, the Supreme Court addressed two issues: (1) Whether the standards of Rule 23 applied with equal weight and consideration to classes certified for settlement purposes alone; and (2) whether Rule 23 was met in this case. On the first issue, Justice Ginsburg, writing for the majority, held that “specifications of the rule–those designed to protect absentees by blocking unwarranted or overbroad class definitions–demand undiluted, even heightened, attention in the settlement context.”\textsuperscript{25} On the second issue, the Court affirmed the Third Circuit’s reversal of class certification because the Plaintiffs had satisfied neither the adequacy of representation standard of Rule 23(a),\textsuperscript{26} nor the Rule 23(b)(3) predominance requirement.\textsuperscript{27} The real significance of \textit{Amchem} lies in the abolitionment of the distinction between litigation classes and settlement classes, which opened the door for the following string of cases that many believe to threaten the very existence of class actions.\textsuperscript{28}

In post-\textit{Amchem} class action lawsuits, the standards of Rule 23 apply regardless of the end-goal of the lawsuit. Now enter \textit{Wal-Mart Stores Inc. v. Dukes}.\textsuperscript{29} In \textit{Wal-Mart},

\textsuperscript{24} \textit{Amchem}, 521 U.S. at 597 (“This case concerns the legitimacy . . . of a class-action certification sought to achieve global settlement of current and future asbestos-related claims. The class proposed for certification potentially encompasses hundreds of thousands, perhaps millions, of individuals tied together by this commonality.”)

\textsuperscript{25} \textit{Id.} at 620.

\textsuperscript{26} With regard to the representation analysis under Rule 23(a)(4), the Court concluded, “an undivided set of representatives could not adequately protect the discrete interests of both currently afflicted and exposure-only claimants.” \textit{Id.} at 610.

\textsuperscript{27} \textit{Id.} at 626. Despite addressing the issue of predominance first, the basis for reversal is the failure to satisfy Rule 23(a), as that is a prerequisite to the Rule 23(b) analysis.

\textsuperscript{28} “The emergence of myriad cases that cut back the ability to pursue class-wide relief represents a troublesome trend that undermines the compensation, deterrence, and efficiency functions of the class action device.” Symposium, \textit{supra} note 2, at 735. “Unless these trends are corrected by the courts, rule makers, and Congress, the compensation, deterrence, and efficiency functions of the class action device will continue to be compromised.” \textit{Id.}

\textsuperscript{29} \textit{Wal-Mart} delivered the next big blow to the class action device and prompted somewhat of a trend of increased judicial scrutiny when analyzing individual requirements of Rule 23. \textit{See} 131 S. Ct. 2541 (2011).
the Supreme Court addressed the issue of standard of proof at the certification stage in one of the largest class actions ever filed.\(^{30}\) The proposed class in the Title VII employment discrimination action consisted of both current and former female Wal-Mart employees.\(^{31}\) In a very tight decision, the five-Justice majority of the Supreme Court overturned the Circuit Court’s certification, holding that Plaintiffs must satisfy something more than a mere pleading standard at the class certification stage.\(^{32}\) The Court justified this expansive rule by distinguishing class certification process from pleading standards, stating that “a party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.”\(^{33}\) Furthermore, the *Wal-Mart* held that Rule 23 requires courts to conduct a rigorous analysis of the facts at bar, which may overlap with the merits of the substantive claim.\(^{34}\) Although the *Wal-Mart* decision acknowledged that the merits of a case may be taken

\(^{30}\) *Id.* at 2547.

\(^{31}\) The expansive “class compris[ed] [of] about one and a half million plaintiffs.” *Id.*

\(^{32}\) *Id.* at 2451

\(^{33}\) *Wal-Mart*, 131 S. Ct. at 2551 (emphasis in the original). The Court further illustrated when this merits inquiry was justified, citing Rule 23(b)(3)’s application in securities fraud cases:

Rule 23(b)(3)’s requirement that questions of law or fact common to class members predominate over any questions affecting only individual members would often be an insuperable barrier to class certification, since each of the individual investors would have to prove reliance on the alleged misrepresentation. But the problem dissipates if the plaintiffs can establish the applicability of the so-called fraud on the market presumption. . . . To invoke this presumption, the plaintiffs seeking 23(b)(3) certification must prove that their shares were traded on an efficient market, an issue they will surely have to prove again at trial in order to make out their case on the merits.

*Id.* at 2552 n.6 (internal quotations omitted).

\(^{34}\) Because class certification occurs just after the pleading stage of litigation, generally without a chance for discovery, the *Wal-Mart* decision seemingly represented a large shift away from the traditional standard. *Wal-Mart*, 131 S. Ct. 2541 (2011); *but see Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). Even under the heightened pleading standards of *Ashcroft v. Iqbal*, a merits inquiry is generally inappropriate during pleadings for two reasons: (1) there is no opportunity for discovery, thus no access to proof, and (2) any inquiry into the merits of the substantive case should be made by the fact-finder, which is usually thought to be the jury, not the judge. *See generally Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
into account at the certification stage, the Court did not address how deep or shallow any inquiry into the merits should be.\(^{35}\)

In *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, the Supreme Court addressed the issue of proof at the class certification stage under Rule 23(b)(3) specifically.\(^{36}\) The defendants, accused of securities fraud, “contend[ed] that to meet the predominance requirement, [Plaintiffs] must do more than plausibly plead” the facts underlying the allegations.\(^{37}\) The *Amgen* Court rejected the stringent standard proposed by the defendants and instead held that “Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class.”\(^{38}\) While the requirement for proof at the class certification stage is more burdensome than the pleadings phase in traditional single party litigation, class action advocates took a sigh of relief since the Court stopped shy of requiring a probability of success showing at this early stage.\(^{39}\) “Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent -- that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.”\(^{40}\) While limiting the close judicial scrutiny in degree, *Amgen* increased judicial scrutiny in kind as it applied the fact

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\(^{35}\) While the Court left the issue of how deep a merits inquiry should be at the certification stage open-ended, the principles of prior Supreme Court rulings serve to limit the inquiry. See *Eisen*, 417 U.S. at 165.

\(^{36}\) *Amgen*, 133 S. Ct. 1184.

\(^{37}\) *Id.* at 1191. The Defendant specified that “certification must be denied unless [the plaintiffs] prove materiality.” *Id.*

\(^{38}\) *Id.* at 1191. *Amgen* seems to reign in the Court’s trend toward invasive fact inquiries at the earliest stages of litigation.

\(^{39}\) See discussion of the Supreme Court’s distinction between the pleading and class certifications stages of litigation in n.29, supra.

\(^{40}\) *Amgen*, 133 S. Ct. at 1194-95. “[T]he office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the method best suited to adjudication of the controversy fairly and efficiently.” *Id.* at 1191.
intensive merits review to the second prong of the Rule 23 analysis for the first time.\footnote{Applying the reasoning and analysis from \textit{Wal-Mart v. Dukes}, a Rule 23(a) case, Justice Ginsburg, writing for the majority, extended the merits inquiry approach to the Rule 23(b) analysis. \textit{id.} at 1194.}

As a general rule, after \textit{Amgen} the same rules and burdens of proof apply to Rule 23(b) inquiries as apply to Rule 23(a).

\section*{C. An Uncertain Future: The Implications of the \textit{Comcast} Decision}

The Supreme Court most recently addressed burdens of proof at the class certification state in \textit{Comcast Corp v. Behrend}, a case involving class formation under Rule 23(b)(3). In \textit{Comcast}, the respondents were Comcast customers in the Philadelphia market, which included sixteen counties in Pennsylvania, Delaware, and New Jersey.\footnote{Comcast v. Behrend, 133 S. Ct. 1426, 1430 (2013) (The Philadelphia market included several counties because Comcast and its subsidiaries “engaged in a series of transactions that the parties have described as clustering, a strategy of concentrating operations within a particular region;” the region discussed in this case is referred to as “the Philadelphia Designated Market Area”) (internal quotation marks omitted).} The respondents filed a class action antitrust lawsuit, against the now petitioners, alleging violations of both §1 and §2 of the Sherman Antitrust Act.\footnote{Id. Section One of the Sherman Act prohibits “every contract . . . or conspiracy . . . in restraint of trade or commerce among the several States.” 15 U.S.C. §1. Section Two of the Sherman Act provides, in pertinent part:}

\begin{quote}
Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished.
\end{quote}

15 U.S.C. §2. All private claims brought under antitrust law must allege an antitrust injury, “which is to say [an] injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.” \textit{Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.}, 429 U.S. 477, 489 (1977).

\footnote{Comcast, 133 S. Ct. at 1430.}
strategy, as alleged by the respondents, the petitioner’s market share in the Philadelphia DMA increased significantly between 1998 and 2007.\textsuperscript{45}

The respondents’ antitrust claim was premised on four distinct theories of antitrust: (1) Comcast’s activities precluded direct broadcast satellite providers from entering the market; (2) Comcast’s acquisitions decreased competition from “overbuilders”; (3) the acquisitions also decreased competition in such a way as to reduce the respondents’ ability to compare prices; and (4) the clustering activities increased Comcast’s bargaining power in the Philadelphia DMA.\textsuperscript{46} Under the predominance inquiry, the District Court held that the plaintiffs had to prove two elements: (1) An antitrust impact “capable of proof at trial through evidence that was common to the class;” and (2) damages measurable on a class-wide basis.\textsuperscript{47} Based on the regression model provided by plaintiff’s expert witness,\textsuperscript{48} the class was certified, but only based on the overbuilder theory.\textsuperscript{49} Comcast appealed the certification under Federal Rule of Civil Procedure 23(f).\textsuperscript{50} A divided panel of the Third Circuit affirmed the formation of the class.\textsuperscript{51}

\textsuperscript{45} Id. ("As a result of nine clustering transactions, petitioners’ share of subscribers in the region allegedly increased from 23.9 percent in 1998 to 69.5 percent in 2007.").
\textsuperscript{46} Id. at 1431 (each of plaintiffs’ theories varied slightly with regard to the alleged illegal conduct as well as the anticompetitive effect).
\textsuperscript{47} Id.
\textsuperscript{48} As Justice Scalia points out, and the expert acknowledged, “the model did not isolate damages resulting from any one theory of antitrust impact.” Id.
\textsuperscript{49} Id. at 1431, n.3 ("The District Court did not hold that the three alternative theories of liability failed to establish antitrust impact, but merely that those theories could not be determined in a manner common to all the class plaintiffs.").
\textsuperscript{50} Rule 23(f) provides:

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.
i. The Scalia Majority

On appeal, the Supreme Court reversed the certification, holding that the class had failed to prove “that damages resulting from th[e] injury were measurable on a class-wide basis through the use of a common methodology.”

Justice Scalia immediately set the tone of the opinion by highlighting two themes: (1) the distinction between the plausible pleadings standard and the proof in fact standard for class certification; and (2) the Court’s recent cases calling for rigorous analysis, including an inquiry into the merits of the claim if necessary. According to the majority, the requirements of Rule 23(b)(3) are especially demanding because the Rule “is designed for situations in which class-action treatment is not as clearly called for,” as evidenced by “Congress’s addition of procedural safeguards for (b)(3) class members . . . , and the court’s duty to take a close look at whether common questions predominate over individual ones.”

Applying these rules to the facts of the case, Justice Scalia acknowledged, “the first step in a damages study is the translation of the legal theory of the harmful event into an analysis of the economic impact of that event.” Because the respondents based their damage model on all four theories of antitrust injury instead of the

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Fed. R. Civ. P. 23(f). This Rule allows for an interlocutory appeal after the certification stage. Before this provision, defendants could not appeal a class action lawsuit until final judgment was entered, thus many class action lawsuits settled at the threat of liability on a class-wide basis alone and were rarely appealed.

52 Comcast, 133 S. Ct. 1426, 1430 (2013) (internal quotation marks omitted).
53 Id.
54 Id. at 1442 (internal quotation marks omitted); see also Symposium, supra note 4, at 792 (Rule 23(b)(3), at its inception, “was considered the most complicated and controversial portion of modern Rule 23.”) (internal quotation marks omitted). But see Cavanagh, supra note 2, at 157 (“Since Rule 23(b)(3) was amended in 1966 to broaden the availability of class actions, the vast majority of certification applications have been made under this rule.”) (emphasis added).
55 Comcast, 133 S. Ct. 1432.
56 Id. at 1434.
“overbuilder” theory alone, the Court ruled that the certification was inappropriate under the Rule 23(b)(3) predominance standard. In concluding that the plaintiffs’ damage model did not satisfy Rule 23(b)(3), the majority conceded that “calculations need not be exact, but at the class-certification stage (as at trial), any model supporting a plaintiff’s damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation.”

ii. The Ginsburg Dissent

Justice Ginsburg, joined by three Justices, wrote an impassioned dissent in this case. The dissent addressed three major issues with the majority’s opinion: (1) the majority resolved an issue that was not properly briefed and presented before the court, (2) while seemingly increasing the standard of proof required to certify a Rule 23(b)(3) class, the majority did not enunciate a new rule to bind lower courts, and (3)

57 “[T]he model assumed the validity of all four theories of antitrust impact initially advanced by the respondents.”
58 Id.
59 Id. at 1435 (Ginsburg, J., joined by Sotomayor, Kagen, and Breyer, dissenting).
60 Id. (Ginsburg, J., dissenting).
61 Id. (Ginsburg, J., dissenting).
62 This point on stare decisis is especially important to consider when addressing the possible trends that may, and have already, begun to take hold in the Federal Circuits and their respective district courts. See generally Wal-Mart, 131 S. Ct. 2541; Comcast, 133 S. Ct. 1426.
the majority “ma[de] broad statements about antitrust law that it could not mean to apply in other cases.”

On this second point, the dissenters argue that the majority opinion did not increase the standard for class certification under Rule 23(b)(3) and should not be read to have done so. The dissent relies on both the conflicts that the new rule would create with existing precedent, as well as the ambiguous language of the majority opinion. Relying on Amchem, the dissent argues that “th[e] predominance requirement is meant to test whether proposed classes are sufficiently cohesive to warrant adjudication by representation, but it scarcely demands commonality as to all questions.”

Lastly, the dissent critiques the majority’s characterization of antitrust law. In the dissenter’s view, a claim under Section Two of the Sherman Act only requires “the plaintiff [to] prove (1) the possession of monopoly power in the relevant market, . . . (2) the willful acquisition or maintenance of that power, . . . [and] (3) the monopolization caused injury.” Under this view, the plaintiff’s regression model was sufficient to illustrate supracompetitive prices as a result of defendants’ anticompetitive conduct.

III. Analysis

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63 This last point, along with the previous point, is of particular importance to justifying a narrow interpretation of the Comcast majority’s opinion. Furthermore, these holes in the majority provide lower courts with a Lynch pin to either distinguish future cases from Comcast or avoid being bound in the first place. Id. at 1435-40 (Ginsburg, J., dissenting).
64 Id. at 1436 “[T]he decision should not be read to require, as a prerequisite to certification, that damages attributable to a class-wide injury be measureable on a class-wide basis.” Id.
65 Id. (Ginsburg, J., dissenting)
66 Comcast, 133 S. Ct. at 1436 (Ginsburg, J., dissenting) (internal quotes omitted).
67 Comcast, 133 S. Ct. at 1437 (Ginsburg, J., dissenting). The critique of the antitrust issue is particularly relevant to bifurcated approach discussed in Part III, infra.
68 Id. (internal quotes omitted).
69 Id. at 1438.
A. The Broad-Sweeping Rule: Increasing the Standard of Proof at the Class Certification Stage Across The Board

i. The Rule In Action

Under the broadest reading of the Comcast majority’s approach, plaintiffs would now be required to prove, at the certification stage, (1) an injury “capable of proof at trial through evidence . . . common to the class rather than to its individual members,” and (2) that damages are measurable “on a class-wide basis” using a “common methodology.”70 This approach would not only involve an inquiry into the merits as permitted by Wal-Mart and Amgen, but an additional, and generally fact-intensive inquiry into the calculation of damages.

ii. Inconsistencies In The Expansive Interpretation

The first issue that arises under this approach is the lack of support in the language of the majority.71 To adopt the broadest interpretation of Comcast would be to “overread the precedent-setting decision [to] intuit more radical legal changes than [the case] explicitly embraced.”72 In Comcast, the majority stated that the case “turn[ed] on a straightforward application of class certification principles.”73 Furthermore, the majority placed the most emphasis on relating the class-wide substantive claim to class-wide damages, which suggests an issue with causation not damages.74

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70 See Comcast, 133 S. Ct at 1430.
71 The Comcast majority, authored by Justice Scalia, a devout textualist, failed to unequivocally adopt a new standard of proof for class certifications.
73 Comcast at 1430.
74 Id.
Secondly, this broad interpretation of Comcast is inconsistent with other Supreme Court decisions regarding class action certification. Just months before deciding Comcast, the Court proclaimed “Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage.” This broad interpretation would allow courts to “feel free to examine merits issues at the class certification stage, thereby crossing a once impenetrable line.” Generally, the Court’s intent to depart from a well-settled principle of law must be clear and unambiguous before it is accepted as superseding the pre-existing rule.

Third, a broad interpretation of Comcast leads to a rule that is inconsistent with both the rules and policy rationale for current class certification rules. In class action litigation, the class certification stage can be likened to pleadings in a traditional lawsuit because the plaintiffs rarely have the opportunity for discovery, thus lacking access to the best information. The pleading standard in general, individual litigation requires that a plaintiff allege facts sufficient to make the complaint plausible on its face. Even under this modern, more stringent pleading standard, courts have never required fact specific pleadings. Because class certification, like pleadings, occurs before litigation or even pre-trial discovery, the plaintiff’s burden in a class action lawsuit should be driven by the same policies and principles as traditional pleading standards. Congress intentionally made antitrust liability significantly higher than other forms of litigation, thus

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75 Amgen, 133 S. Ct. at 1194-95.
76 Cavanagh, supra note 2, at 158 (emphasis added); see also Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 165 (1974) (rejecting the analogy between preliminary injunctions and class certifications with regard to burdens of proof). To the extent that it is still valid after Wal-Mart, Eisen still provides an important limitation on the depth of inquiry at the class certification.
77 See Steinman, supra note 63, for a discussion of the harms associated with inferential stare decisis.
78 See Twombly, 550 U.S. 544; Iqbal, 556 U.S. 662.
restricting plaintiff’s ability, or at the very least incentive, to bring a case should be left in the hands of the legislature. While antitrust carries a significant penalty, and thus burden for defendants, that burden is intentional and meritorious plaintiffs should not be penalized for the valid distinction.

B. Confining Comcast to It’s Facts: A Bifurcated Approach

   i. Arbitrary Distinctions

   A second option available to lower courts is to interpret Comcast as applying to only antitrust cases. This approach would allow lower courts to apply the broadest interpretation of Comcast, which is the heightened standard of proof, to antitrust cases while maintaining a case-by-case merits inquiry for all other non-complex litigation cases. This bifurcated approach would address the clear concerns of the Court regarding sever civil liability in complex class action cases, such as antitrust, while protecting the efficiency rationale of Rule 23(b)(3) classes generally, but it is not without its problems.81

   i. Complex Confusion: When does the new rule apply?

   While this approach would address most, if not all, of the Supreme Court’s concerns in Comcast, this bifurcated approach, with regard to antitrust, is impractical and has not been accepted in the past.82 The impracticality of a bifurcated approach

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81 Distinguishing antitrust cases from other, less complex class action cases makes sense if the Court is concerned about overarching civil liability because antitrust causes of action are unique in that prevailing plaintiffs win treble damages as well as attorney’s fees. See Sherman Act. The stakes in antitrust litigation are much higher than in other non-complex forms of litigation traditionally brought as a class action. See Butler v. Sears, Roebuck & Co., 727 F.3d 796 (7th Cir. 2013) (distinguishing the straightforward product defect case from the complex damage issue in Comcast).

82 Antitrust litigation has sparked massive shifts in other procedural areas of law and the Supreme Court has held that the heightened rule applied across the board and was not specific to the antitrust cause of action. See Twombly, 550 U.S. 544 (2007); see also Ashcroft v. Iqbal, 556 U.S. 662 (2009).
comes two fold: (1) when do we apply the heightened standard to other forms of complex litigation, and (2) what standard applies when a class seeks to be certified for issues involving antitrust litigation as well as non-complex litigation issues. Furthermore, this bifurcated approach is inconsistent with the legislative history of the Sherman Act and related antitrust statutes.

The first issue with this interpretation of Comcast relates to when this new, heightened standard would apply. While differentiating the treatment of claims based on the substantive law has been supported in other areas of law, those scenarios, unlike the case here, called for the differentiated approach under a clear and specific rule. The Comcast Court did not expressly differentiate this case from any other based on applicable substantive law or the complexity of the inquiry involved.

Another issue that arises under this approach is how the standards are applied in cases involving both antitrust and non-antitrust issues.

Lastly, this approach is inconsistent with the legislature’s intention in enacting antitrust laws. One of the characteristics that distinguishes antitrust law in the United States from other antitrust regimes is the provision for treble damages in a private action. Congress intentionally made antitrust liability significantly higher than other forms of litigation, thus restricting plaintiff’s ability, or at the very least incentive, to bring a case should be left in the hands of the legislature. While antitrust carries a significant

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83 See Fed. R. Civ. P. 9(b), which states: “In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.”

84 The dissent did argue that the majority rested their analysis on several assumptions specific to antitrust law; however, this argument is not enough for lower courts to hang their hat on when seeking to differentiate between the standards applied in antitrust and non-antitrust cases.

penalty, and thus burden for defendants, that burden is intentional and meritorious plaintiffs should not be penalized for the valid distinction.

B. The Case-by-Case Merits Inquiry: Preserving the Rule

i. How it works

This third and final approach available to lower courts preserves the rule set forth in *Amgen*, but increases judicial discretion with regard to the merits inquiry. Under this interpretation of *Comcast*, lower courts would not apply a heightened standard at the class certification stage; but the courts would rely on the rigorous analysis of the Rule 23 criteria to address concerns regarding frivolous class actions on a case-by-case basis. Increasing judicial scrutiny while allowing the judge to use discretion on a case-by-case basis promotes an efficient rule of law and policy, one of which the Supreme Court would likely approve.

ii. The benefits of a merits-based approach

1. Judicial Realities

Despite the modern Supreme Court’s advocacy for heightened standards of proof and increased judicial scrutiny in class certification cases, the Seventh Circuit’s traditional Rule 23(b)(3) approach is indicative of how the trend will develop. Because the Seventh Circuit is generally recognized as relatively conservative with regard to

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86 *Amgen*, 133 S. Ct. at 1184.

87 Plaintiffs’ class action lawyers have responded to legislative reform in very telling ways. As the standards governing class creation have increased, lawyers have shifted their filings based on perceptions of liberal certification practices. Among those circuits that experienced huge increase in the number of class action lawsuits filed in their district courts were the Ninth, Third, Second and Eleventh Circuits. Symposium, *supra* note 2, at 823. The Seventh Circuit was among the group that experienced substantially less post-reform growth. *Id.* (“The Seventh Circuit endorsed not only rigorous review of the evidence, but also the resolution of conflicting evidence bearing on the merits.”) (discussing the Seventh Circuits opinion in 249 F.3d at 676-77).
class action lawsuits, the support of the traditional approach in *Butler v. Sears*, *Roebucks* may lead us to believe this is the best, and most practical rule, across ideologies and judicial preferences.  

2. Risk of abuse

A large concern that comes with promoting a standard that puts most of the deciding power in the hands of the discretion of trial judges is that of abuse or inconsistency. In this case, that risk is especially large because this approach encourages judges to look at the merits of a case at the earliest stage of litigation, which has the potential to usurp the jury’s power to decide the facts of each case. The fact-finder role of juries is inherent to our judicial system and may still be preserved under this approach so long as judges exercise proper restraint and the inquiry is limited to the degree which is necessary to decide predominance.

3. Public policy considerations support the Seventh Circuit interpretation of the *Comcast* decision

The purpose served by requiring a class certification judgment is to ensure that class action litigation is a fair and efficient way of resolving the dispute, thus the depth of inquiry should reflect that preliminary analysis function.  

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88 Many of the judicial reforms to class action litigation have originated in the Seventh Circuit. *Id.; see also In re Rhone-Poulene Rorer, Inc.,* 51 F.3d 1293 (7th Cir. 1995). Furthermore, the Court of Appeals for the Seventh Circuit is generally in line with the Supreme Court on issues arising in class action litigation and the appropriate way to deal with those issues. Symposium, supra note 2, at 823.

89 Courts, post-*Comcast*, have not had an issue limiting the merits inquiry to that which is necessary under the circumstances. See *In re Nexium (Esomeprazole) Antitrust Litigation*, 2013 U.S. Dist. LEXIS 162276, *19. (“It is true that the Court’s rigorous analysis overlaps with the merits . . . , but Defendants are trying to push the . . . Court toward a full-blown merits analysis, which is forbidden and unnecessary at this point.”)(citing *Amgen*, 133 S. Ct. at 1194-95).

90 The purpose of Rule 23(b)(3) is to “achieve economies of time, effort, expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.” Fed. R. Civ. P. 23(b)(3) advisory committee notes to 1966 amendment. While this committee note is far from clear, it does suggest that the framers of the 1966 amendment considered the “predominance” class, provided for in Rule 23(b)(3), to be a tool of efficiency and convenience. Judge
class actions that achieve efficiency and decisional consistency by aggregating suits with common questions into a single adjudication, as well as class actions that promote private enforcement of the substantive law by enabling litigation where individual suits would not be cost justified.”

II. Impact

A. Barring Plaintiff’s access to justice

The broadest reading of the Court’s decision in Comcast would do nothing less than minimize business liability to the exclusion of economies of litigation. Reading the predominance requirement of Rule 23(b)(3) to necessitate the application of a standard greater than efficiency would “drive a stake through the heart of the class action device.” Under a more stringent approach, “defendants would be able to escape liability for tortious harms of enormous aggregate magnitude but so widely distributed as not to be remediable in individual suits.” Judge Posner aptly cites Seventh Circuit precedent, which recognizes that “the realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.” The problem with increasing the standard of proof at the class certification is the restricted availability of class actions as a viable litigation tool. While the Supreme
Court undoubtedly seeks to limit class actions, requiring plaintiffs to prove class-wide damages at the certification stage would not merely limit class actions, but rather threaten to eliminate this form of litigation in its entirety.95

B. Detrimental impact on business’ ability to bar future litigation arising from the same claims

Rule 23(b)(3) is the only provision that allows the parties to preclude all future litigation on the claims, save for those eligible parties that choose to opt out of class litigation.96 Since the radical transformation of Rule 23 in 1966, most class action lawsuits are brought under the remodeled opt-out Rule 23(b)(3) – The opt-out feature works to the benefit of businesses as well as plaintiffs.97 The benefits that opt-out class actions provide to businesses, the usual defendants in class action lawsuits, come in the form of efficiency, predictability, and finality. Lawsuits and the related damage awards, whether they arise through settlement or litigation, are business costs that must be bore by the defendant company. Just as class actions save plaintiffs litigation costs through collective action, the reverse must be true for businesses.98 The predictability and finality benefits can be balled into one in that once a lawsuit is brought against the

95 “As Judge Posner once famously wrote, ‘only a lunatic or a fanatic sues for $30.’” Special Section: Consumer Protection Law: Article: Unprotected Class: Five Decisions, Five Justices, and Wholesale Change to Class Action Law, 13 Wyo. L. Rev. 463,464 (2013)(citing Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004). Judge Posner is often cited for the proposition that the “realistic alternative to a class action is no action at all.” Id.

96 Fed. R. Civ. P. 23(b)(3)

97 Cavanagh, supra note 4, at 157; see also J. Douglas Richards & Ben Brown, Predominance of Common Questions – Common Mistakes in Applying the Class Action Standards, 41 Rutgers L.J. 163, 163 (2009).

98 Assuming that we adopt a rule that preserves the plaintiff’s access to the courts, the business is in a much better position to defend the claims together rather than separately. Under Judge Posner’s rationale, a more stringent rule may prevent most individual plaintiffs from filing suit – This obviously would save businesses money, but at what cost?
defendant; the likelihood of additional litigation on related matters is slim-to-none.  

If we adopted a rule that promoted individual litigation over collective action, no business would be able to predict how many lawsuits they would be facing, or when they would be filed – Neither of these issues arises under a fair and efficient class action regime.  

Rule 23(b)(3) provides a type of efficiency for defendants that the other provisions of Rule 23(b) cannot, thus limiting Rule 23(b)(3) may actually hurt defendants, this increase commercial litigation costs and inefficiencies.

III. Conclusion

Finding a balance between commercial liability and individual remedies in a litigious society is never easy; however, minimizing business liability at the expense of foreclosing judicial outlets to plaintiffs impermissibly shifts the scales in favor of commercial interests. Federal Rule of Civil Procedure 23(b)(3) was enacted with both plaintiffs and defendants in mind to promote efficiency and allow for economies of litigation. Adopting the broadest view of the Comcast majority’s ruling is at odds with both the spirit of Rule 23 and earlier Supreme Court precedent and would drive a stake through the heart of the class action device.  

The bifurcated approach is also inconsistent with the judicial systems notion of uniformity and equality.  

While the

99 The “new Rule 23 was designed to be a classwide preclusion device rather than a limited exception to mandatory joinder.” Bone, supra note 5, at 1103

100 Consistent, bright-line “rules provide predictability to those making business decisions.” Cavanagh, supra note 4, at 132.

101 See Butler, 727 F.3d at 809.

102 An analysis of the United States’ Antitrust laws is outside of the scope of this paper; however, a strong argument could be made against an interpretation that heightens the standards for plaintiffs seeking an antitrust redress, but not for all other plaintiffs. When Congress instituted a regime that included treble damages, the only regime in the world to do so, it was aware of the way our judicial system functioned and relative easy of entry to the court. Laws are enacted and juries are intended to decide the outcome
balance of equities is not completely lopsided when the heightened standard of proof is applied to only antitrust class litigation – because the treble damages weigh in favor of cautious class certification, a bifurcated rule has proven to be unworkable and unpopular in previous cases involving an increased procedural hurdle.

A narrow interpretation of the Court’s decision in Comcast, which allows judges to use their discretion when analyzing each case’s merits at the certification stage, is the best of both worlds. This approach gives judges a heavy hand in deciding whether the issues of a proposed class sufficiently predominate while preserving the judicial systems integrity. Furthermore, this approach is most in line with Supreme Court precedent and other procedural standards proscribed in the Federal Rules of Civil Procedure.