

# Second Circuit To Decide Split Within The District Courts On Class Certification After Comcast Corp. V. Behrend

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For many wage-and-hour plaintiffs, the ability to band together with other potential plaintiffs is critical to vindicating their rights. While the Fair Labor Standards Act provides for a collective action mechanism, many wage-and-hour claims arise under more protective state laws. Litigants bringing a class action under these state laws in federal court – which is common, as the state law claims are often brought along with federal wage-and-hour claims – are required to satisfy the elements of Federal Rule of Civil Procedure 23. It is, therefore, unsurprising that all eyes are on two district court cases currently before the Second Circuit, which will soon decide a split between them with regard to the effect of the Supreme Court’s recent decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

## **Comcast v. Behrend**

Under Rule 23(b)(3), in order for a court to grant class certification, “questions of law or fact common to class members” must “predominate over any questions affecting only individual members.” In *Comcast*, the U.S. Supreme Court analyzed this predominance requirement in the context of an antitrust suit in which the plaintiffs, who were moving for class certification, alleged that Comcast had engaged in a series of transactions in violation of federal antitrust laws. The plaintiffs alleged four different theories of liability, and their proposed damages model took each theory into account. However, it was held that the plaintiffs could only move forward on one of their four theories of liability. The plaintiffs’ damages model was incapable of separating out damages attributable to the single viable theory of liability. Thus, the Supreme Court held that the predominance requirement could not be met because, if damages could not be calculated on a classwide basis, individual damages calculations would “overwhelm” questions common to the class.

## **Comcast in the Wage-and-Hour Context**

District courts across the country have taken three approaches to interpreting the effect of *Comcast* on class certification in the wage-and-hour context. Under the first approach, courts have permitted class certification in the wage-and-hour context, holding that a review of relevant records should permit a manageable analysis of each individual’s damages by way of a common formula. Under the second approach, courts have applied *Comcast* broadly, implicitly holding that class certification will never be appropriate in the wage-and-hour context given that nearly all cases will require some level of individualized damages analysis (described in more detail below). Lastly, certain courts have embraced a middle ground by invoking Rule 23(c)(4), which allows for bifurcation of particular issues when appropriate. These courts have bifurcated the issues of liability and damages by certifying a class for the purposes of determining liability, which would be followed by separate and individualized damages determinations.

**Split in the Second Circuit**

No Court of Appeals has adopted the second, broader interpretation of Comcast, which many reasonably believe would eviscerate wage-and-hour class actions altogether. Yet, this was the interpretation adopted in *Roach v. T.L. Cannon Corp.*, No. 10-cv-0591(TJM)(DEP), 2013 WL 1316452 (N.D.N.Y. Mar. 29, 2013). Indeed, the Roach court found that the question of damages could not be separated from questions of liability for purposes of Rule 23 class certification. The court explained that the claim of each putative class member would turn on a highly individualized analysis of the hours each class member worked, the wages they were paid and how time-recording practices were applied to each of them individually. As such, the court rejected the plaintiffs' motion for class certification on the basis that the plaintiffs did not offer a damages model capable of measurement on a classwide basis.

Conversely, in *Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578 (S.D.N.Y. 2013), the Southern District of New York flatly rejected the Roach court's interpretation of Comcast and held that, although damages in that case could not be determined on a classwide basis, class certification would not automatically be defeated. The court explained that "while Comcast surely requires some inquiry into the relationship between injury and damages at the class certification stage, this Court understands Comcast to require a linkage between those two, rather than forbidding bifurcation in the event of individualized proof." Thus, the court bifurcated the issues of liability and damages consistent with the third approach described above.

The decisions in both *Roach* and *Jacob* were appealed to the Second Circuit, and the court is addressing the decisions together. The resolution of the split between the two courts' approaches will have a very significant impact on wage-and-hour litigation in the Second Circuit. If *Roach* is affirmed, this could very well eviscerate class actions in the wage-and-hour context, as any wage-and-hour action will require at least some individualized inquiry into the specific damages of each class member. In contrast, if *Jacob* is affirmed, this will severely limit the effect of the Comcast decision in the wage-and-hour context. While damages might not be subject to classwide determination, issues of liability will still be litigated on a classwide basis. An affirmation of the *Jacob* decision may ultimately increase the cost of defending wage-and-hour litigation.

Whether you are an employee or employer, having a complete understanding of Comcast, *Roach* and *Jacob* is vital. When the Second Circuit decides *Roach* and *Jacob*, it will be equally important to have a complete understanding of that decision. Without it, it will be impossible to accurately predict the cost of litigating wage-and-hour class actions and estimating potential liability.

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