

# Second Circuit Narrows The Impact Of The Supreme Court Decision In Comcast Corp. V. Behrend And Holds That “Individualized Damages Determinations” Do Not Prevent Class Certification Under Rule 23(b)(3)

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On February 10, 2015, the Second U.S. Circuit Court of Appeals (Judges Jacobs, Droney and Kaplan) issued two important decisions, *Roach v. T.L. Cannon Corp.* and *Jacob v. Duane Reade, Inc.* that resolved the uncertainty over whether pursuant to *Comcast Corp. v. Behrend*, as a prerequisite to class certification under Rule 23(b)(3), a court must determine that “damages attributable to a classwide injury [are] measurable on a classwide basis.” In so ruling, the Second Circuit held that “Comcast did not hold that a class cannot be certified under Rule 23(b)(3) simply because damages cannot be measured on a classwide basis.” Rather, the Second Circuit reasoned that Comcast simply reiterated the rule that damages questions should be considered at the certification stage when weighing predominance issues and that “this requirement is entirely consistent” with prior decisions and “straightforward application of class-certification principles.”

In *Roach*, the Second Circuit ruled that a lower court erred in refusing to allow a wage-and-hour lawsuit to proceed as a class action because it improperly interpreted Comcast as requiring that damages be measurable on a classwide basis, not on an individual basis. The plaintiffs in that case were former employees at Applebee’s restaurants throughout New York who were not paid wages pursuant to New York Labor Law (“NYLL”). The plaintiffs alleged that Cannon had a policy of not paying hourly employees an extra hour of pay when working a ten-hour work day as was required (the “spread-of-hours” pay), and also that Cannon required its managerial staff to subtract pay for statutorily-mandated rest breaks that the employees did not actually take (the “rest-break” claim).

The district court denied class certification of both claims, ruling that after the Supreme Court’s recent decision in *Comcast*, a class action cannot be maintained whenever monetary relief must be calculated on an individual basis for each member of the class. See *Roach v. T.L. Cannon Corp.*, No. 3:10-CV-0591 (TJM/DEP), 2013 WL 1316452 (N.D.N.Y. Mar. 29, 2013). Without considering whether there existed any common questions of law or fact, the district court concluded that proof of damages on the claims was “highly individualized and questions of individual damages calculations will inevitably overwhelm questions common to this class.” *Id.* at \*4-5. The Second Circuit vacated and remanded back to the district court with the following guidance: the question “whether issues susceptible to generalized proof outweigh individual issues” is simply one factor in the predominance analysis.

The Second Circuit’s narrow interpretation of Comcast is in agreement with the other circuit courts that have addressed the same question, including the First, Fifth, Sixth, Seventh, Ninth and Tenth circuits. See *In re: Deepwater Horizons, The Impact of The Supreme Court Decision In Comcast Corp. V. Behrend And Holds That “Individualized Damages Determinations” Do Not Prevent Class Certification Under Rule 23(b)(3)*, 739 F.3d 790, 817 (5th Cir. 2014); *In re: VHS of Michigan, Inc.*, Index No. 14-Supreme Court Decision In Comcast Corp. V.

cv-0107, (6th Cir., February 3, 2015); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 799 (7th Cir. 2013); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013).

On the same day that the Roach decision was issued, the Second Circuit released a summary order in *Jacob v. Duane Reade, Inc.*, 13-cv-3873 that similarly held that Comcast does not require an analysis as to whether common questions predominate over individualized questions in the case as a whole before certifying the class with respect to any specific issue. Affirming the district court's grant of certification pursuant to Rule 23(b)(3), in a case involving the misclassification of assistant managers and failure to pay overtime, the Second Circuit in *Duane Reade* referred to the Roach decision and explained that Comcast has narrow application and the analysis in the Second Circuit under Rule 23(b)(3) remains unchanged:

In lawsuits that involve a number of subsidiary questions, each of which may or may not be proven in common...., the plaintiffs' burden to demonstrate predominance requires them to make two showings: that some of the subsidiary questions can be answered with respect to the members of the class as a whole through generalized proof and that those common issues are more substantial than individual ones.

The two decisions provide clarity for district courts presented with motions for certification in cases where individualized damages may vary for class members and puts an end to the speculation that plaintiffs face substantial obstacles for future requests of certification under Rule 23(b)(3).

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