LIABILITY ONLY, PLEASE—HOLD THE DAMAGES: THE SUPREME COURT'S NEW ORDER FOR CLASS CERTIFICATION

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INTRODUCTION

A group of people who own the same mold-producing washing machine;[1] local cable subscribers who were forced to pay higher rates after a new cable provider took over;[2] customers who purchased a washing machine with a defective control unit;[3] a group of local store managers that did not receive proper overtime pay.[4] These are not big, rich companies or individuals with millions of dollars at stake. These are small-claims plaintiffs—individuals seeking justice on a small monetary scale, but justice nonetheless.

A broad face-value interpretation of the recent Supreme Court decision *Comcast Corp. v. Behrend*[5] would likely deny all of these small-claims plaintiffs justice.[6] In *Comcast* the Court pushed the predominance requirement for achieving certification in a Rule 23(b)(3) class action to a new height by requiring classes to show that they can demonstrate damages on a class-wide basis using a model that is directly tied to the class's theory of liability.[7] Previously, classes only had to show that the class was cohesive by demonstrating that issues common to the class predominated over any individual issues in the case.[8]

Classes seeking monetary damages fall within the Rule 23(b)(3) category of class actions.[9] Under Rule 23(b)(3), classes typically seek certifica-

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1 *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig. (*Whirlpool II*), 722 F.3d 838, 844 (6th Cir. 2013), *cert. denied sub nom.* Whirlpool Corp. v. Glazer, 134 S. Ct. 1277 (2014).

2 Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1430 (2013).

3 Butler v. Sears, Roebuck & Co., 727 F.3d 796, 799 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014).

4 Jacob v. Duane Reade, Inc., 293 F.R.D. 578, 580 (S.D.N.Y. 2013).

5 133 S. Ct. 1426 (2013).

6 *See id.* at 1433.

7 *Id.*

8 FED. R. CIV. P. 23(b)(3); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623-24 (1997).

9 *See* FED. R. CIV. P. 23(b)(3) advisory committee's notes to 1966 amendment.

tion as liability-and-damages classes.[10] This means that during the court's predominance inquiry, the court must consider both liability and damages issues.[11] A lesser-used alternative, liability-only classes, asks the court to only analyze liability issues, while disregarding damages issues.[12] A liability-only class concedes that damages are likely too varied to determine as a class and would be better managed individually in separate trials following a finding of liability as a class.[13]

In *Glazer v. Whirlpool Corp.*,[14] owners of mold-producing washing machines filed a class action against the manufacturer under Rule 23(b)(3) as a liability-only class.[15] The consumers suffered different harms; some saw mold and others did not.[16] Yet, all the consumers owned the same model of a defective washing machine.[17] Because the *Whirlpool* consumers each only sought compensation for their own defective washing machines, their individual costs would outweigh any expected payoff from a lawsuit. The liability-only class was, therefore, composed of small-claims plaintiffs, who would not have the economic incentive to pursue a lawsuit individually.[18] The class action mechanism greatly benefits small-claims classes, like the *Whirlpool* consumers, because class members are able to share the cost of litigation, making the suit economically appealing.[19]

Before the recent *Comcast* decision, the *Whirlpool* class had an opportunity to seek justice as a liability-only class. Under a broad interpretation of *Comcast*, however, a similar liability-only class might not have the same opportunity. Since liability-only classes explicitly concede that damages are varied among the class, it would be impossible to provide a class-wide damages model, as *Comcast* demands.[20] Some district and circuit courts rejected a broad interpretation of *Comcast* and instead interpreted it narrowly as only applying to liability-and-damages classes, like the class in *Com-*

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10 *See, e.g.*, *Comcast*, 133 S. Ct. at 1430-31.

11 *Id.* at 1433.

12 Comcast v. Behrend*: Has It Made an Impact?*, CLASS ACTION Q., Fall 2013, at 1.

13 *Id.*

14 722 F.3d 838 (6th Cir. 2013), *cert. denied sub nom.* Whirlpool Corp. v. Glazer, 134 S. Ct. 1277 (2014).

15 *Id.* at 844, 846.

16 *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., No. 1:08-WP-65000, 2010 U.S. Dist. LEXIS 69254, at *4-5 (N.D. Ohio July 12, 2010), *aff'd*, 678 F.3d 409 (6th Cir. 2012), *vacated sub nom.* Whirlpool Corp. v. Glazer, 133 S. Ct. 1722 (2013) (mem.).

17 *Id.* at *3

18 *Id.*

19 1 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 1:3, at 7, 9 (5th ed. 2011).

20 *See* Butler v. Sears, Roebuck & Co., 727 F.3d 796, 801 (7th Cir. 2013) (pointing to analogous damage issues as in *Whirlpool*), *cert. denied*, 134 S. Ct. 1277 (2014); Jacob v. Duane Reade, Inc., 293 F.R.D. 578, 580 (S.D.N.Y. 2013) (recognizing that class members all suffered from improper overtime pay, but for varied amounts); *Whirlpool*, 2010 U.S. Dist. LEXIS 69254, at *9 (conceding that damages are varied among the class of washing machine owners because some class members saw mold and suffered from its effects, while other class members did not see mold yet, but are still at risk).

cast.[21] These courts distinguished liability-only classes from liability-and-damages classes, making liability-only classes exempt from the strict *Comcast* holding and easier to achieve than liability-and-damages classes.[22]

This Comment argues that the narrow interpretation of the *Comcast* holding that many courts have adopted is not only correct, but that it is in fact what the Supreme Court intended in its *Comcast* ruling. By intentionally omitting whether its heightened predominance requirement applied to liability-only classes, as well as liability-and-damages classes, the Court was indirectly pushing parties to seek liability-only class certification instead of liability-and-damages certification. Part I of this Comment explains the reasoning in creating the class action tool, and the foundational values—efficiency and fairness—that caused parties and courts to widely adopt class actions. Additionally, Part I provides the basic requirements for achieving class certification, which has become the turning point of class actions. Part II of this Comment hones in on Rule 23(b)(3) classes, which include any class seeking monetary damages. Rule 23(b)(3) has heightened requirements, including predominance, which is this Comment's primary focus. Over time, courts have made it increasingly difficult to demonstrate predominance and achieve class certification, especially after the Supreme Court's recent holding in *Comcast*. Part II concludes by discussing the liability-only distinction that multiple district and circuit courts recognize. Part III of this Comment asserts that those courts are correct in their liability-only distinction, because it is unlikely that the Supreme Court would want to bar small-claims plaintiffs seeking certification as a liability-only class. This Comment proposes that the Supreme Court made a deliberate omission in failing to address the applicability of its holding in *Comcast*, in order to reconfigure Rule 23(b)(3) class actions to favor liability-only classes instead of liability-and-damages classes. Liability-and-damages classes have become inefficient for parties and courts, so the Supreme Court likely intended to replace the liability-and-damages norm with a new norm—liability-only classes.

I. THE PURPOSE OF CLASS ACTIONS

Almost forty years ago, in *Johnson v. Railway Express Agency, Inc.*,[23] the Supreme Court recognized "the purposes of litigatory efficiency served by class actions."[24] More recently, the Supreme Court affirmed this observation in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance*,[25]

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21 *See Whirlpool II*, 722 F.3d at 860; *Sears*, 727 F.3d at 799; *Duane Reade*, 293 F.R.D. at 581.

22 *See Whirlpool II*, 722 F.3d at 860; *Sears*, 727 F.3d at 800; *Duane Reade*, 293 F.R.D. at 580.

23 421 U.S. 454 (1975).

24 *Id.* at 466 n.12, *quoted in* 1 RUBENSTEIN ET AL., *supra* note 19, § 1:9, at 26 n.1.

25 559 U.S. 393 (2010).

stating that class actions are "designed to further procedural fairness and efficiency."[26] A class action is a procedural device that allows one or more representative plaintiffs to litigate on behalf of a large group of similarly situated plaintiffs.[27] Class actions are governed by Rule 23 of the Federal Rules of Civil Procedure ("FRCP"), which were promulgated in 1938 and amended in 1966 by an Advisory Committee.[28] Relatively new to the legal toolkit, class actions did not become widely accepted and utilized until the 1980s, when courts recognized the efficient value of class actions in lessening overloaded court dockets, as Section A of this Part discusses.[29] As class actions became more popular, they also became more widely abused, which led to a realization by courts and parties that class actions are meant to promote not only efficiency, but also fairness.[30] This prompted formal changes to improve fairness for class actions, such as Rule 23(f) and the Class Action Fairness Act ("CAFA"), which Section B explains.[31] All of this history helped shape the current state of class actions and Rule 23—a sometimes puzzling and blurry maze of rules and legal precedent, particularly within the first and most important step of a class action, class certification, which Section C expounds.[32]

A. *Class Actions Promote Efficiency*

Congress designed the original 1938 FRCP to achieve functionalism for easy application.[33] However, Rule 23 in particular was unsuccessful in this goal.[34] In 1938, courts rarely saw class actions, so the original drafters were unsure how to create rules for a mostly unknown practice, especially without any real-life examples or models.[35] The result was a set of rules that were less functional and more abstract, making them difficult to apply.[36] However, at the time, this abstractness was not problematic because courts

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26 *Id.* at 402, *quoted in* 1 RUBENSTEIN ET AL., *supra* note 19, § 1:9, at 26-27 & n.2.

27 1 RUBENSTEIN ET AL., *supra* note 19, § 1:1, at 2.

28 *Id.* at 3; Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J.L. REFORM 1097, 1100, 1102 (2013).

29 Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 736 (2013); *see also infra* text accompanying notes 33-52.

30 Klonoff, *supra* note 29, at 737-38.

31 *Id.* at 739-45.

32 Bone, *supra* note 28, at 1099.

33 *See id.* at 1100-01.

34 *See id.*

35 *See id.*

36 FED. R. CIV. P. 23 advisory committee's notes to 1966 amendment (Difficulties with the Original Rule); *see* Bone, *supra* note 28, at 1100-01.

and parties were not trying to implement class actions often, regardless of Rule 23's design.[37]

In 1966, the Advisory Committee completely eliminated the 1938 abstract class categories.[38] The Advisory Committee redrafted a more functional Rule 23 to encourage courts and parties to use the class action device.[39] In general, the Advisory Committee had practicality and fairness in mind when drafting Rule 23.[40] The Advisory Committee introduced preliminary requirements for a class to satisfy before identifying with a specific class category.[41]

Without an incentive to cross into somewhat uncharted territory, courts and parties remained reluctant to use the class action tool until the 1980s, when an incentive promptly arrived.[42] During this time, a wave of mass-tort cases flooded court dockets.[43] Typically, courts favored individual adjudication, using joinder when appropriate, instead of class actions.[44] However, increasingly swelling dockets persuaded courts to recognize the efficiency value of class actions in order to avoid continuously adjudicating identical issues.[45] Courts needed a legitimate way to lighten the docket loads, and class actions offered a solution by allowing courts and parties to consolidate common issues and achieve efficiency.[46]

Courts are comprised of scarce resources—judges, courtrooms, time, and money.[47] In an environment made up of scarce resources, efficiency is important.[48] When a court can choose between one lawsuit and multiple individual lawsuits covering the same issue, efficiency favors selecting the singular lawsuit.[49] A class action can achieve this singular lawsuit.[50] Class actions preserve administrative resources in the court, as well as party resources, such as time and money.[51] By addressing many individual claims

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37 *See* Bone, *supra* note 28, at 1100-01.

38 FED. R. CIV. P. 23 advisory committee's notes to 1966 amendment (Difficulties with the Original Rule).

39 Klonoff, *supra* note 29, at 736.

40 FED. R. CIV. P. 23 advisory committee's notes to 1966 amendment (Difficulties with the Original Rule).

41 *Id.*

42 Klonoff, *supra* note 29, at 736.

43 *Id.* (stating courts faced a high number of tort claims because of reactions to Agent Orange and asbestos).

44 *See id.* at 736-37.

45 *Id.* (discussing the Fifth Circuit's willingness to rely on class actions at this time, even though today the Fifth Circuit is known as the most reluctant circuit to uphold class certifications).

46 1 RUBENSTEIN ET AL., *supra* note 19, § 1:9, at 26-28.

47 *See* Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 48 (1975).

48 *Id.*

49 *Id.* at 49.

50 1 RUBENSTEIN ET AL., *supra* note 19, § 1:9, at 26-29.

51 *See* Dam, *supra* note 47, at 48-49.

through one class action, judges are then available to address other lawsuits on their dockets.[52]

B. *Class Actions Promote Fairness*

Once courts and parties witnessed class actions' valuable efficiency, these lawsuits gained popularity.[53] As courts and plaintiffs began to better understand and more commonly seek the effective results of class actions and Rule 23, issues quickly arose with plaintiffs and opportunistic behavior.[54] Throughout the 1980s, 1990s, and early 2000s, class actions settled for billions of dollars.[55] Class actions often ended in settlement and rarely passed beyond the first stage of class certification into trial.[56] In theory, settlement sounds beneficial to all parties, allowing them to save litigation costs by avoiding trial; however, these benefits were matched by problems.[57] Riding the wave of class actions, attorneys charged high fees to counsel classes into settlement, often resulting in minimal monetary relief for class members.[58] Originally a procedural tool designed to benefit courts and plaintiffs, class actions became a way for lawyers to cash in big, giving class actions a bad name.[59]

Defendants also were not pleased with the progression of class actions throughout the 1980s, 1990s, and early 2000s.[60] Although class actions initially gained momentum after a wave of mass-tort cases in the 1980s, they spread throughout a wide array of legal areas, including antitrust, consumer

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52 1 RUBENSTEIN ET AL., *supra* note 19, § 1:9, at 27. This especially becomes an issue because judges are facing not only civil claims, but also criminal suits, in which the public holds a strong interest. Dam, *supra* note 47, at 52.

53 *See* Klonoff, *supra* note 29, at 736 & nn.28-29 (citing mass-tort cases such as *In re* Sch. Asbestos Litig., 789 F.2d 996 (3d Cir. 1986), *cert. denied*, 479 U.S. 852 (1986) and *In re* "Agent Orange" Prods. Liab. Litig., 818 F.2d 145 (2d Cir. 1987)).

54 *Id.* at 737-38.

55 *Id.* at 737; *see also* Scott S. Partridge & Kerry J. Miller, *Some Practical Considerations for Defending and Settling Products Liability and Consumer Class Actions*, 74 TUL. L. REV. 2125, 2162 (2000).

56 Klonoff, *supra* note 29, at 737.

57 *See id.* at 737-38.

58 *Id.* at 737; Bone, *supra* note 28, at 1110.

59 *See* Klonoff, *supra* note 29, at 736-38; *see also* Bone, *supra* note 28, at 1110; *see, e.g.*, Walter Olson, *All About Erin*, REASON.COM (Oct. 1, 2000, 12:00 AM), http://reason.com/archives/2000/10/01/all-about-erin (explaining events of the famous "Erin Brockovich" class action suit that were not reported in the film, particularly that some class members filed suit against the representing law firm, which retained 40 percent of the $333 million settlement; additionally, an outside lawyer who interviewed class members discovered that not all class members received the entire reported and promised compensation owed).

60 *See* Klonoff, *supra* note 29, at 737-38.

protection, and products liability.[61] With more high-stakes class actions came more targeted defendants.[62] The pressure of losing huge amounts of money to multiple plaintiffs in just one lawsuit gave plaintiff classes leverage over defendants, even for weak suits.[63] During the 1980s and 1990s, courts tended to favor granting class certification, because the court could correct an incorrect certification in a later trial addressing the entire class action.[64] However, this procedural safeguard was largely irrelevant, because once a court certified a class for trial, many defendants chose to settle over the risk of litigating and losing such an extravagant lawsuit.[65]

Once settlement after certification became the norm in class actions, class certification became the turning point of a class action.[66] If a court granted class certification, defendants would likely be willing to settle rather than proceed to trial.[67] If a court denied class certification, defendants would likely not feel pressure to settle, because the suit likely could not proceed any further since the costs for any individual suit were greater than the expected damages award.[68] However, the 1938 and 1966 Rule 23 drafters likely did not predict class certification becoming the focus of class actions, because Rule 23 did not provide a way for parties to appeal class certification decisions.[69] Some courts recognized this lack of fairness and employed uncommon methods to review certification decisions.[70]

In response to the focus on certification and the outcry for fairness reform, the Advisory Committee on Civil Rules added Rule 23(f) in 1998.[71] Rule 23(f) allows interlocutory appellate review for both plaintiffs and defendants after a trial court makes a certification order.[72] Plaintiffs are able to appeal a denial of certification, and defendants are able to appeal a grant of

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61 *Id.* at 736-37.

62 *See id.* at 738.

63 Bone, *supra* note 28, at 1110.

64 *Id.* at 1111-12.

65 Klonoff, *supra* note 29, at 738.

66 *Id.* at 746.

67 *See id.* at 731.

68 Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Court of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1546 (2000).

69 *See* FED. R. CIV. P. 23(f) advisory committee's notes to 1998 amendment; *see also* Klonoff, *supra* note 29, at 738.

70 *See* Klonoff, *supra* note 29, at 738 (stating that in 1995, the Seventh Circuit allowed the "extraordinary writ of mandamus" to review a certification decision and in 1996, the Fifth Circuit reviewed a certification order, because the district court was willing to certify the issue for appeal using a tactic that most other district courts were unwilling to exercise).

71 FED. R. CIV. P. 23(f) advisory committee's notes to 1998 amendment (explaining that interlocutory appeals will help alleviate pressure on defendants to settle class actions by offering the chance for a higher court to review a class certification order).

72 *See* FED. R. CIV. P. 23(f); *id.* advisory committee's notes to 1998 amendment; *see also* Klonoff, *supra* note 29, at 740.

certification.[73] This ability to ask for interlocutory review extends to not only federal circuit courts of appeal, but also to the Supreme Court.[74]

The introduction of Rule 23(f) interlocutory review marked the beginning of a shift within the courts towards fairness between plaintiffs and defendants.[75] The adoption of Rule 23(f) fixed the problems surrounding unfair leverage over defendants.[76] Over the course of about fourteen years, approximately 69 percent of the Rule 23(f) appeals of certification orders were by defendants, and of those appeals, 70 percent were reversed in favor of the defendants.[77] Of the plaintiff appeals, only 30 percent were reversed in favor of the plaintiffs.[78] Plaintiffs thus no longer held unfair and uncontestable leverage over defendants, because courts were able and more willing to take a second and harder look at class-certification orders.[79]

In 2005, Congress formally addressed another fairness issue within class actions by enacting CAFA.[80] Before CAFA, defendants had difficulty removing class actions from state to federal courts.[81] If there was not a federal question involved, class actions could only be removed to federal court if there was complete diversity between plaintiffs and defendants, as well as a minimum amount-in-controversy of $75,000 per class member.[82] This set a high bar for class actions, because class actions sometimes involve large groups of people from multiple states or a group of small-claims plaintiffs looking for a minimal remedy.[83] On top of these requirements, other restrictions on removal, such as time constraints, unanimous defendant consent to remove, and defendant citizenship further hindered fairness for defendants.[84]

Being relegated to state court did not bode well for either party.[85] State courts were associated with extreme examples of class action abuse against

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73 *See* FED. R. CIV. P. 23(f); *id.* advisory committee's notes to 1998 amendment; *see also* Klonoff, *supra* note 29, at 740.

74 *See* FED. R. CIV. P. 23(f); *id.* advisory committee's notes to 1998 amendment; *see also* Klonoff, *supra* note 29, at 740.

75 Klonoff, *supra* note 29, at 739.

76 *See* FED. R. CIV. P. 23(f) advisory committee's notes to 1998 amendment; *see also* Klonoff, *supra* note 29, at 741.

77 Klonoff, *supra* note 29, at 741.

78 *Id.*

79 *Id.*

80 Class Action Fairness Act, 28 U.S.C. §§ 1711-1715, 1453 (2012).

81 *See* Klonoff, *supra* note 29, at 744-45.

82 28 U.S.C. §§ 1332(a), 1441(b); Klonoff, *supra* note 29, at 744-45.

83 *See* Klonoff, *supra* note 29, at 743.

84 *See* 28 U.S.C. §§ 1332, 1441, 1447; *see also* Klonoff, *supra* note 29, at 744-45 (noting defendants (i) only had one year to remove to federal court from the date the class action was filed; (ii) if there were multiple defendants in a class action, all the defendants had to consent to removal to federal court; and (iii) removal was not permitted if a defendant qualified as a citizen of the state where the suit was brought).

85 *See* Klonoff, *supra* note 29, at 743-44.

defendants, because many state court judges favored in-state class members over out-of-state defendant companies.[86] Both parties suffered without the availability of interlocutory appeals on class certification decisions under Rule 23(f), since the rule only applies in federal court.[87] CAFA recognized and fixed these fairness issues by making removal more attainable for defendants.[88] CAFA allows class actions to be removed to federal court regardless of parties' diversity.[89] Since CAFA, most class actions are successfully removed to federal court.[90] This shift promoted fairness, because federal judges do not have an incentive to unfairly favor plaintiff classes, and even if they did, defendants can use Rule 23(f) to appeal to a higher court for review.[91]

The introduction of Rule 23(f) and CAFA signaled two big changes for class actions. First, these changes ushered in a new wave of judicial preference of defendants.[92] Second, both Rule 23(f) and CAFA responded to issues arising within the certification process, therefore confirming that class certification had become the turning point of most class actions.[93]

C. *The First and Most Important Step—Class Certification*

Before a class action trial can actually commence, a court must certify a class of plaintiffs.[94] This means that a group of people has judicial approval to proceed as a class.[95] Certification is based on Rules 23(a) and 23(b) of the FRCP, which lay out a list of requirements that a proposed class has the burden of demonstrating.[96]

First, Rule 23(a) presents four mandatory prerequisites that a class must meet to maintain a class action.[97] The Rule 23(a) prerequisites are

> (1) [Numerosity—] the class size is large enough that joinder of each member as an individual litigant is impracticable;
> (2) [Commonality—] the questions of law or fact are common to the class;

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86 *Id.* at 743.

87 *See id.* at 743-44.

88 *See id.* at 745.

89 28 U.S.C. § 1453(b).

90 *See* Klonoff, *supra* note 29 at 740, 743-45.

91 *See id.*

92 *See infra* Part II.B (explaining how courts continued to make certification even harder for plaintiffs, almost eliminating the leverage power that plaintiffs once possessed during the early years of class actions).

93 *See supra* Part I.B.

94 FED. R. CIV. P. 23(c)(1)(A).

95 *See id.* 23(c).

96 *Id.* 23(a)-(b); *see also* 1 RUBENSTEIN ET AL., *supra* note 19, §1:2, at 4.

97 FED. R. CIV. P. 23(a).

> (3) [Typicality—] the class representative(s)'s claims or defenses are typical of those of the class; and
> (4) [Adequacy—] the class representative(s) will adequately represent those interests.[98]

Once a prospective class meets the 23(a) prerequisites, the class must then demonstrate that it fits into one of the provided 23(b) categories.[99] Rule 23(b) presents four situations where a class action is appropriate.[100] The first and second categories fall under an umbrella of prejudicial class actions in Rule 23(b)(1), where the failure to use a class action to adjudicate an issue could result in a prejudice against certain class members.[101] The third category, Rule 23(b)(2), is for classes seeking injunctive or declaratory relief.[102] Rule 23(b)(2) classes are used when courts must settle the legality of a defendant's behavior in relation to an entire class.[103] Rule 23(b)(3) offers a final catch-all category in situations where a class may not obviously fit under Rule 23(b)(1) & (2), but is desirable by achieving "economies of time, effort, and expense."[104] In practice, Rule 23(b)(3) classes include any class seeking some type of monetary damages.[105] Even if a class action involves prejudicial or injunctive issues, classes must certify under Rule 23(b)(3) whenever the class is seeking some type of monetary damages, making Rule 23(b)(3) a common certification category.[106] As a result, most classes seek certification under Rule 23(b)(3).[107]

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98 *Id.*

99 *Id.* 23(b); *see also* 1 RUBENSTEIN ET AL., *supra* note 19, §1:3, at 5.

100 FED. R. CIV. P. 23(b)(1)-(3) ("(1) separate actions . . . would create a risk of: (A) . . . incompatible standards of conduct . . . ; 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; (2) . . . final injunctive relief . . . is appropriate respecting the class as a whole; or (3) . . . the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.").

101 *Id.* 23(b)(1) advisory committee's notes to 1966 amendment; *see, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 838 (1999) (explaining that a traditional example of a class appropriate for Rule 23(b)(1) involves a defendant's limited fund that is incapable of providing for all interested plaintiffs individually, so the limited fund must be managed in one class action suit).

102 FED. R. CIV. P. 23(b)(2) advisory committee's notes to 1966 amendment.

103 *Id.*; *see, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557 (2011) (explaining that class actions under Rule 23(b)(2) are only appropriate when there is some behavior by the defendant that can be declared unlawful as to all of the class members as a whole, and monetary damages are not involved).

104 FED. R. CIV. P. 23(b)(3) advisory committee's notes to 1966 amendment.

105 *See id.*

106 *Wal-Mart*, 131 S. Ct. at 2557-58 (holding that it was inappropriate for a class to seek certification under FRCP 23(b)(2) when damages were involved in any way, even if the main component of the class's claim was related to FRCP 23(b)(2), because class actions involving monetary damages should be held to the strictest requirements, which are found in Rule 23(b)(3)).

107 Klonoff, *supra* note 29, at 792.

Rule 23(b)(3) classes achieve efficiency and fairness particularly well by serving two main types of groups seeking money damages.[108] First, in a situation where a mass harm has occurred, a large number of plaintiffs will seek monetary relief for their individual harms caused by a common source.[109] As in the 1980s, when courts faced a wave of mass-tort cases,[110] a class action achieves efficiency and avoids an overload in the courts by litigating the mass harm through one class.[111]

The second type of group that the 23(b)(3) category addresses is the small-claims suit,[112] like the class seeking damages for defective washing machines.[113] In these situations, litigation would likely not be possible without a class action method because the cost of litigating an individual suit outweighs the expected recovery.[114] In this scenario, the 23(b)(3) category enables individuals with a common small-claim issue to come together and share the costs of litigation as a class.[115] Although Rule 23(b)(3) accepts both large-claim and small-claim suits, the Advisory Committee creating the categories "had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'"[116]

For example, imagine 1,000 people from across the country purchase a certain brand and model of refrigerator for $1,000 each.[117] After one year, each of the 1,000 refrigerator owners suffers from a refrigerator full of spoiled groceries as a result of a defect in the refrigerator. Each refrigerator owner has only incurred a little over $1,000 in total damages,[118] but each is furious about having to purchase a new refrigerator after only a year. However, none of the owners would likely have a monetary incentive to bring a lawsuit against the refrigerator manufacturer because the cost of litigation is almost certainly greater than $1,000. It is clear, however, that the refrigerator manufacturer has wronged these consumers. In this scenario, Rule 23(b)(3) would allow these small-claim individuals to come together as a

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108 *See* 1 RUBENSTEIN ET AL., *supra* note 19, §§ 1:3, 1:9, at 8-9, 26-27; Bone, *supra* note 28, at 1102-03.

109 1 RUBENSTEIN ET AL., *supra* note 19, § 1:3, at 8-9.

110 Klonoff, *supra* note 29, at 736.

111 1 RUBENSTEIN ET AL., *supra* note 19, § 1:9, at 26-27; Bone, *supra* note 28, at 1102-03.

112 1 RUBENSTEIN ET AL., *supra* note 19, § 1:3, at 7.

113 *Whirlpool II*, 722 F.3d 838, 846-51 (6th Cir. 2013), *cert. denied sub nom.* Whirlpool Corp. v. Glazer, 134 S. Ct. 1277 (2014).

114 *See id.* at 852-53; Bone, *supra* note 28, at 1103; Dam, *supra* note 47, at 49.

115 1 RUBENSTEIN ET AL., *supra* note 19, § 1:3, at 9.

116 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969)).

117 *Samsung-18 Cu. Ft. French Door Refrigerator-White*, BEST BUY, http://www.bestbuy.com/site/samsung-18-cu-ft-french-door-refrigerator-white/4674441.p?id=1218503656611# (last visited Jan. 6, 2015).

118 Accounting for the refrigerator and cost of groceries that spoiled.

class and share the cost of litigation in one lawsuit. Although enabling small-claims plaintiffs to join together in a class means more suits are brought in the short term, small-claims classes achieve beneficial long-term efficiency.[119] Without small-claims class actions, defendant companies might not have an incentive to change their wrongful behavior.[120] Small-claims classes deter defendants from bad behavior, which results in fewer lawsuits long term.[121]

While classes certified under Rule 23(b)(3) offer justice, efficiency, and fairness, they also offer complexities. Before any practical issues arose, in 1966, the Advisory Committee was already concerned that Rule 23(b)(3) would invite classes that were too varied to litigate in one lawsuit.[122] In response, the Advisory Committee set a higher bar of certification requirements, specifically for Rule 23(b)(3) classes, and courts have not stopped raising it.[123]

II. CLASS CERTIFICATION UNDER 23(B)(3)

Unlike classes seeking certification under Rule 23(b)(1) or (2), classes seeking certification under Rule 23(b)(3) must demonstrate two additional requirements—predominance and superiority.[124] Section A of this Part explains the introduction of Rule 23(b)(3)'s predominance and superiority requirements. The 1966 Advisory Committee included these new requirements as a safeguard against classes that were not homogeneous enough due to individual members that had more of an interest in the outcome of the litigation.[125] While the courts consider both of these factors equally, predominance gained more attention over time for its evolving and sometimes puzzling interpretation.[126] As Section B of this Part discusses, over the past two decades a trend has emerged as courts addressing the predominance requirement made it increasingly difficult to achieve certification under Rule 23(b)(3). Most recently, the Supreme Court placed the predominance bar at essentially unreachable heights for some classes, which Section C of this Part discusses.[127]

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119 *See* 1 RUBENSTEIN ET AL., *supra* note 19, § 1:9, at 26-27.

120 *Id.* at 28.

121 Dam, *supra* note 47, at 49.

122 *See* Fed. R. Civ. P. 23(b)(3) advisory committee's note to 1966 amendment; *see also* Bone, *supra* note 28, at 1104-05.

123 *See* Bone, *supra* note 28, at 1104-05.

124 2 RUBENSTEIN ET AL., *supra* note 19, at § 4:47, at 188-89. This Comment primarily focuses on the predominance requirement, but superiority is equally important to courts during class certification.

125 *See* Bone, *supra* note 28, at 1104.

126 *See id.* at 1106.

127 *See* Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433 (2013).

A. *The Birth of Predominance*

When creating the Rule 23(b)(3) category, the Advisory Committee focused on achieving the desired economies by implementing two additional requirements that classes must meet—predominance and superiority.[128] Superiority simply asks the court to determine if a class action is the best procedural device or legal method to determine the case, in comparison to other available options.[129] Predominance, however, is not as straightforward. Rule 23(b)(3) states predominance as existing when "the questions of law or fact common to class members predominate over any questions affecting only individual members."[130] The Advisory Committee envisioned that the predominance requirement would bar classes where individual interests are strong and better managed in individual adjudications.[131] Specifically, the Advisory Committee pointed out that mass-accident classes would likely not satisfy the predominance requirement because of the strong individual interests of each injured plaintiff.[132]

The predominance requirement is not a bright-line rule and instead asks courts to qualitatively weigh individual issues against class-wide issues,[133] making results varied and sometimes unpredictable.[134] In 1997, the Supreme Court explicitly addressed the predominance requirement for the first time.[135] In *Amchem Products, Inc. v. Windsor*,[136] the Court refused to certify an asbestos class because the plaintiffs' claims did not meet the pre-

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128 FED. R. CIV. P. 23(b)(3) advisory committee's notes to 1966 amendment.

129 *Id.*

130 *Id.* 23(b)(3).

131 *See id.* advisory committee's notes to 1966 amendment.

132 *Id.*

133 *See* Stillmock v. Weis Mkts., Inc., 385 Fed. App'x. 267, 273 (4th Cir. 2010) ("Rule 23(b)(3)'s commonality-predominance test is qualitative rather than quantitative."); Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 429 (4th Cir. 2003) (holding that the class met the predominance requirement because a qualitative analysis revealed that common liability issues exceeded trivial individual issues); Grillasca v. Hess Corp., No. 8:05-cv-1736-T-17-TGW, 2007 WL 2121726, at *16 (M.D. Fla. July 24, 2007) (explaining that courts must focus on qualitative analysis and not quantitative analysis when determining if a class meets the predominance requirement), *motion to reconsider granted in part on other grounds sub nom.* Grillasca v. Amerada Hess Corp., No. 8:05-cv-1736-T-17TGW, 2007 WL 2702334, at *3 (M.D. Fla. Sept. 14, 2007).

134 *See In re* Nassau Cnty. Strip Search Cases, 461 F.3d 219, 227-28 (2d Cir. 2006) (applying Rule 23(b)(3)'s predominance to a class even though the class already settled answers to the questions common to the class, so that only individual questions remained and no judicial efficiency would be gained from the class action suit); Barnes v. Am. Tobacco Co., 161 F.3d 127, 142-43 (3d Cir. 1998) (extending a cohesiveness test that resembles predominance to a Rule 23(b)(2) class, even though Rule 23(b)(2) does not mention cohesiveness or predominance as a requirement); *see also* Bone, *supra* note 28, at 1106-08.

135 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 622-25 (1997).

136 521 U.S. 591 (1997).

dominance requirement.[137] The Court understood the predominance requirement to be "far more demanding" than the Rule 23(a) commonality requirement.[138] The Court introduced a cohesiveness test when determining predominance, looking at "whether proposed classes are sufficiently cohesive to warrant adjudication by representation."[139] The Supreme Court concluded that the varied health injuries among individual class members weighed more heavily than the common fact that all class members had been exposed to asbestos at some point through the course of using the defendant's products.[140] The Supreme Court relied on the Third Circuit's focus on the significant differences among class members, including their health habits, the type of exposure each faced, and the resulting diseases in each plaintiff.[141] The Supreme Court advised courts to use caution when analyzing the predominance requirement in cases where "individual stakes are high and disparities among class members great."[142]

The Court's cohesiveness test did not clarify the predominance requirement—instead, it made the rule more puzzling.[143] Courts struggled to apply it, because the Court in *Amchem* did not provide any reasoning behind its interpretation to help guide its future application.[144] Based on this confusion among courts about what predominance meant and how classes were to achieve it, predominance became a blurry and inconsistent requirement.[145] In general, when determining if a class meets the predominance requirement, courts weigh both common and individual issues to assess whether individual issues outweigh common issues.[146] However, courts do not all agree on how heavily individual issues should weigh against common issues.[147] While some courts apply a more rigid approach with individualized issues almost always defeating predominance, other courts apply a more flexible approach and allow certification when common issues weigh heavier than individual issues.[148]

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137 *Id.* at 624-25.

138 *Id.* at 623-24 (explaining that predominance does not only look to see that all class members have something in common, such as being exposed to asbestos, but instead goes further to analyze and compare various common and uncommon questions among the class).

139 *Id.*

140 *Id.*

141 *Id.* at 624.

142 *Amchem*, 521 U.S. at 625.

143 Bone, *supra* note 28, at 1106.

144 *Id.* at 1107.

145 *See supra* notes 133-134 and accompanying text; *see also* Klonoff, *supra* note 29, at 792-801.

146 Bone, *supra* note 28, at 1111.

147 *See* Klonoff, *supra* note 29, at 792-801.

148 *Compare* Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433 (2013), *and* Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 434 (4th Cir. 2003) (finding the class did not satisfy the predominance requirement because individual inquiries were necessary for legal determinations), *with* Klay v. Humana, Inc., 382 F.3d 1241, 1259 (11th Cir. 2004) (explaining that the existence of individual issues does not defeat a finding of predominance when common issues weigh heavier), *and* Smilow v. Sw. Bell Mobile

Parties rely on multiple different methods to demonstrate predominance and achieve certification under Rule 23(b)(3).[149] The more common and traditional method of seeking certification under Rule 23(b)(3) is as a liability-and-damages class.[150] In this circumstance, the class asks the court to determine both liability and damages for the class. This means a class seeks to show liability as a class and to collect damages on a class-wide basis, usually by using some sort of class-wide calculation method.[151] With a liability-and-damages class, courts consider individual issues pertaining to both liability and damages when determining if the class meets the predominance requirement, such as the *Amchem* class.[152] As in *Amchem*, liability-and-damages classes have difficulty demonstrating predominance when the injuries among class members are too varied, because damages would be individualized instead of common to the class.[153]

Parties less often seek certification as a liability-only class. To do this, parties rely on Rule 23(c)(4), which allows class actions with respect to particular issues when appropriate.[154] This means a class is asking the court only to determine liability—not damages.[155] If the court establishes liability for a class, then the class determines damages individually afterward, either in additional trials or outside of a courtroom through settlement.[156] Some courts are skeptical of parties using Rule 23(c)(4), because the rule can be manipulated as a way for the class to avoid the problem of resulting injuries and damages being too varied among the class.[157] In the mid-1990s, the Fifth Circuit denied certification for a class attempting to take advantage of Rule 23(c)(4) issue certification under Rule 23(b)(3) class certification.[158] The court warned against classes going too far with issue certification by manipulating Rule 23(c)(4) as a way to overcome the predominance re-

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Sys., Inc., 323 F.3d 32, 40 (1st Cir. 2003) (finding that predominance was satisfied even though individual issues existed), *and* Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 306 (5th Cir. 2003) ("Even wide disparity among class members as to the amount of damages suffered does not necessarily mean that class certification is inappropriate . . . .").

149 Bone, *supra* note 28, at 1107-08.

150 *See Issue Certification Under Rule 23(c)(4) in a Post*-Wal-Mart *World*, CLASS ACTION Q., Fall 2013, at 2, 2.

151 *See* 1 RUBENSTEIN ET AL., *supra* note 19, § 1:9, at 29; *see, e.g.*, *Comcast*, 133 S. Ct. at 1433 (holding that a liability-and-damages class did not satisfy the predominance requirement because the class could not provide an adequate class-wide damages calculation model).

152 *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 622-24 (1997).

153 *Id.* at 622-25.

154 FED. R. CIV. P. 23(c)(4) ("When appropriate, an action may be brought or maintained as a class action with respect to particular issues.").

155 *Issue Certification Under Rule 23(c)(4) in a Post*-Wal-Mart *World*, *supra* note 150, at 2.

156 *Id.*

157 *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996); *see Issue Certification Under Rule 23(c)(4) in a Post*-Wal-Mart *World*, *supra* note 150, at 2.

158 *See Castano*, 84 F.3d at 745 & n.21.

quirement when it otherwise would not be met.[159] While this method is more rare, liability-only classes recently gained popularity amongst litigants as courts made predominance more and more difficult to achieve.[160]

B. *Courts Continue to Raise the Predominance Bar*

The requirements to achieve predominance under Rule 23(b)(3) aligned with the trend among courts in the early 2000s to favor defendants.[161] During this time, courts continuously made it more and more difficult for a class to achieve certification.[162] Typically, when courts denied certification of a class under Rule 23(b)(3), they did so by identifying and highlighting any individualized issues to show that predominance was not met.[163] By doing this, over time courts essentially raised the predominance bar and indirectly cast a shadow over classes with any individualized issues, which originally did not bar class certification under Rule 23(b)(3).[164]

Throughout the first decade of the twenty-first century, a series of circuit court decisions began to highlight problems with individualized issues when assessing predominance. In 2001, the Ninth Circuit denied class certification because the court found that individual issues overcame predominance.[165] While the court noted that common liability issues existed, the court focused on the difficulty in determining causation and damages because it was likely that the court would handle these aspects individually.[166] In 2003, the Fifth Circuit denied certification under Rule 23(b)(3) for a fraud-based class action because individualized evidence existed and therefore predominated over any common issues.[167] While it is possible that in this particular case predominance was correctly defeated, it is problematic that the court appeared to assume this conclusion without actually weighing

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159 *Id.*

160 *See* Jenny Mendelsohn, Comcast v. Behrend*: Did Products Liability Defense Attorneys Celebrate Too Soon?*, ALSTON & BIRD: PROD. LIAB. TRENDS & DEVS. (Oct. 14, 2013), http://www.alstonproductsliability.com/comcast-v-behrend-did-products-liability-defense-attorneys-celebrate-too-soon/.

161 *See* Bone, *supra* note 28, at 1112.

162 *See* Klonoff, *supra* note 29, at 792; Tony Lathrop, *A Look at Class Certification Through the Lens of* In re: Whirlpool Corp. Front-Loading Washer Products Liability Litigation*: Finding Commonality & Predominance Despite* Comcast *and* Dukes, MVA LITIG. BLOG (Sept. 27, 2013), http://blogs.mvalaw.com/litigation-law-blog/2013/09/27/a-look-at-class-certification-through-the-lens-of-in-re-whirlpool-corp-front-loading-washer-products-liability-litigation-finding-commonality-predominance-despite-comcast-and-dukes/.

163 Klonoff, *supra* note 29, at 792.

164 *Id.*

165 Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1189-90 (9th Cir. 2001).

166 *Id.*

167 Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co., 319 F.3d 205, 219, 221 (5th Cir. 2003) ("[C]ases that involve individual reliance fail the predominance test.").

the individual and common issues in its opinion.[168] In 2011, the Sixth Circuit denied a class certification under Rule 23(b)(3) based on a lack of predominance.[169] The Sixth Circuit based its decision on the class's need to rely on multiple state laws to properly adjudicate the case.[170] The court held that the need for multiple state laws equated to individual issues, which predominated over any common issues, including a common source of alleged deceptive advertising.[171]

In each of these decisions, the courts relied on individual issues defeating predominance in order to deny certification.[172] The courts never directly or explicitly held that the mere existence of individual issues always defeated predominance. Instead, courts generally agreed that a bright-line rule stating that any individual issues defeated predominance was too drastic.[173] This general agreement was called into question in 2013, when the Supreme Court made an unexpected ruling in *Comcast Corp. v. Behrend*.[174]

District and circuit courts also started requiring a higher standard of proof during the certification stage, adding another burden for classes trying to demonstrate predominance to achieve class certification.[175] In 2011, the Supreme Court responded to this trend in its *Wal-Mart Stores, Inc. v. Dukes*[176] decision. The Court explicitly held that the certification stage was not based on a "mere pleading standard."[177] Instead, the Court said that classes needed to be prepared to affirmatively demonstrate their cases and be able to withstand a "rigorous analysis" by the courts that sometimes dives into the merits of the case.[178] The Court's decision in *Wal-Mart* affirmed a shift away from favoring and relying on plaintiffs' claims during the certification stage, making class certification more difficult.[179]

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168 Klonoff, *supra* note 29, at 796.

169 Pilgrim v. Universal Health Card, LLC, 660 F.3d 943, 946 (6th Cir. 2011).

170 *Id.*

171 *See id.*

172 *Id.*; *Sandwich Chef*, 319 F.3d at 219; Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1189-90 (9th Cir. 2001).

173 *See* Klonoff, *supra* note 29, at 799.

174 *See* R. Joseph Barton, *The Supreme Court Demonstrates Its Predictable Unpredictability in* Comcast v. Behrend, EMP. BENEFITS COMM. NEWSLETTER (ABA Sec. Labor & Emp. Law), Summer 2013, *available at* http://www.americanbar.org/content/newsletter/groups/labor_law/ebc_newsletter/13_sum_ebcnews/predict.html.

175 Bone, *supra* note 28, at 1112.

176 131 S. Ct. 2541 (2011).

177 *Id.* at 2551.

178 *Id.* (quoting Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982)) (internal quotation marks omitted).

179 John Beisner & Geoffrey M. Wyatt, Wal-Mart Stores v. Dukes*: A Year of Substantial Influence*, 12 CLASS ACTION LITIG. REP. (BNA) NO. 13, at 2-3 (Aug. 10, 2012).

C. *The Supreme Court Cleans Up the Mess in an Unexpected Way*

Most recently, in 2013, the Supreme Court explicitly addressed the effect of individualized issues on the predominance requirement of Rule 23(b)(3), and seemingly raised the predominance bar even higher than before.[180] Subsection 1 discusses the Court's reasoning and holding in *Comcast Corp. v. Behrend*, as well as its predicted effects on future class certifications. Subsection 2 then explains judicial reactions to the *Comcast* decision, specifically how liability-only classes under Rule 23(b)(3) are exempt from the Court's latest ruling on predominance. While the Sixth Circuit was the first to address this conflict, other circuit and district courts quickly followed suit, signaling agreement among the lower courts.[181] However, Subsection 3 explains how *Comcast*, when interpreted on its face, conflicts with liability-only classes and actually prohibits their existence.

1. The *Comcast* Decision

In the five-to-four decision of *Comcast Corp. v. Behrend*, the Supreme Court denied class certification for a small-claims class seeking damages due to alleged antitrust violations.[182] The Court held that the class did not meet the predominance requirement, because damages were not "capable of measurement on a classwide basis" when linked to the class's liability theory.[183] The Court reasoned that without requiring damages to be class-wide and specifically related to the class's liability theory, classes would be able to demonstrate Rule 23(b)(3)'s requirement by proposing any arbitrary damages measurement method.[184] The Court stated that allowing this would diminish Rule 23(b)(3)'s unique and heightened predominance requirement.[185]

The District Court for the Eastern District of Pennsylvania first certified the *Comcast* class, which consisted of more than two million current and former subscribers to Comcast cable-television services.[186] On Comcast's Rule 23(f) interlocutory appeal, the Third Circuit Court of Appeals affirmed the district court's certification.[187] The class sought damages due to alleged antitrust-law violations from 1998 to 2007, when Comcast en-

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180 *See* Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433 (2013).

181 *See infra* notes 254-255 and accompanying text.

182 *Comcast*, 133 S. Ct. at 1433.

183 *Id.*

184 *Id.*

185 *Id.* ("Such a proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity.").

186 *Id.* at 1429-30.

187 *Id.* at 1431.

gaged in a series of transactions with competing cable providers in the Philadelphia area.[188] The transactions implemented a clustering strategy under which Comcast obtained competitors' market shares of subscribers in an area where Comcast was already present.[189] In exchange for competitors' market shares, Comcast sold competitors its own shares of subscribers in markets outside of the Philadelphia area.[190] As a result of several cluster transactions, Comcast's market share of subscribers in the Philadelphia area "allegedly increased from 23.9 percent in 1998 to 69.5 percent in 2007," giving Comcast greater control over pricing in the area.[191]

Subscribers in the Philadelphia area filed a class action antitrust suit against Comcast under Rule 23(b)(3), as a liability-and-damages class.[192] The district court's decision to certify turned on whether the class met Rule 23(b)(3)'s predominance requirement.[193] Since the class was a liability-and-damages class, the court was able to weigh individual and common issues arising in the facts surrounding both liability and damages.[194]

The court certified the class based on two conclusions. First, the court found that the class had met its burden in demonstrating that it could prove liability at trial with "evidence that is common to the class rather than individual to its members."[195] Second, the court held that the class had presented a "common methodology available to measure and quantify damages on a class-wide basis."[196] On appeal, the Court of Appeals for the Third Circuit affirmed the class's certification.[197] Although Comcast contended that the class's method of calculating damages was incorrect and therefore insufficient,[198] the Third Circuit found that the class did enough to meet the burden by presenting a common, class-wide calculation solution, regardless of whether the formula was precisely accurate or not.[199]

Comcast appealed to the Supreme Court based on the district court's treatment of the case's merits surrounding Rule 23(b)(3)'s predominance requirement.[200] The Supreme Court granted certiorari, but altered the ques-

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188 *Comcast*, 133 S. Ct. at 1430.

189 *Id.*

190 *Id.*

191 *Id.*

192 *See id.*

193 Behrend v. Comcast Corp., 264 F.R.D. 150, 153-54 (E.D. Pa. 2010) ("The only certification issue that remains in dispute is the requirement . . . that common issues of law and fact predominate."), *aff'd*, 655 F.3d 182, 185 (3d Cir. 2011), *rev'd*, 133 S. Ct. 1426, 1435 (2013).

194 *See id.* at 156-57.

195 *Id.* at 154.

196 *Id.*

197 Behrend v. Comcast Corp., 655 F.3d 182, 208 (3d Cir. 2011), *rev'd*, 133 S. Ct. 1426, 1435 (2013).

198 *Id.* at 206-07.

199 *Id.* at 207.

200 *See* Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1435 (2013) (Ginsburg, J., dissenting) ("Comcast sought review of the following question: '[W]hether a district court may certify a class action

tion presented to focus much more on the class's proposed class-wide damages model.[201] Instead of addressing the question presented by Comcast, the majority took control of its opportunity to address class-wide damages issues and guided its opinion to express a much different message than the parties likely expected.[202]

The Court reversed the lower courts, denying the class certification and holding that the class did not meet the predominance requirement of Rule 23(b)(3).[203] First, the Court briefly addressed Comcast's original question presented.[204] The Court stated that by ignoring the merits behind the damage model, the Third Circuit was in essence holding that presenting any class-wide damages calculation method, no matter how arbitrary, would meet the predominance requirement.[205] The Court held that the result of the Third Circuit's holding "would reduce Rule 23(b)(3)'s predominance requirement to a nullity."[206] After exploring the merits behind the class's proposed damage model, the Court concluded that the model could not apply to the entire class, because class members' individual damages were too varied to fall under one damages-calculation model.[207]

The Court then answered its own question presented by offering a more clearly defined predominance requirement.[208] The Court held that in order to meet the Rule 23(b)(3) predominance requirement, classes must establish that "damages are capable of measurement on a classwide basis."[209] Furthermore, the Court held that classes do not pass the predominance hurdle if the court finds that "[q]uestions of individual damage calculations will *inevitably* overwhelm questions common to the class."[210] While the Court explained that damages calculation models that classes propose

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without resolving 'merits arguments' that bear on [Federal Rule of Civil Procedure] 23's prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3).'" (alterations in original) (quoting another source)).

201 *Id.* at 1431 n.4 (majority opinion) ("Whether a district court may certify a class action without resolving whether the plaintiff class had introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." (quoting Comcast Corp. v. Behrend, 133 S. Ct. 24 (2012) (mem.)) (internal quotation marks omitted)).

202 *Id.* at 1435 (Ginsburg, J., dissenting) (arguing that the question presented that the majority addressed was never clearly presented, so that the parties, including Comcast, did not have the proper notice to tailor its briefs to the reformulated question).

203 *Id.* at 1432-33 (majority opinion).

204 *Id.* at 1433.

205 *Id.*

206 *Comcast*, 133 S. Ct. at 1433.

207 *See id.* at 1434-35.

208 *Id.* at 1432-33.

209 *Id.* at 1433 (stating that this requirement is part of "the straightforward application of class-certification principles").

210 *Id.* (emphasis added).

do not need to be exact, it emphasized the importance of these models not being arbitrary and instead directly tied to liability models.[211]

The four dissenting justices harshly criticized the majority's new burden on classes trying to demonstrate predominance in a Rule 23(b)(3) class action.[212] The dissent recognized that the majority's holding created a higher standard of predominance.[213] The dissent accused the majority of interpreting Rule 23(b)(3) to require "commonality as to all questions," instead of a more attainable standard requiring common issues to weigh heavier than individual issues.[214] As support, the dissent pointed to the "universal" understanding that needing individual damage calculations does not eliminate a class's chance for certification, as long as other issues predominate.[215] The dissent reasoned, therefore, that the majority's ruling was not meant for broad future application.[216]

2. Reactions to *Comcast*

The dissent is not alone in its reaction to the new predominance requirement in *Comcast*. Practitioners in the legal industry were confused as to what question the Court was answering and what the Court intended as its takeaway for future application.[217] Some believe that by reformulating the question presented, the Court was using *Comcast* as a vehicle for its own agenda.[218] The Court wanted to address individualized damages within Rule 23(b)(3)'s predominance requirement and seized the opportunity when *Comcast* arrived.[219]

There is a mix of opinions on what the proper interpretation of the *Comcast* holding should be.[220] One view is that the Court denied certification to the class of Philadelphia subscribers because the class could not show a damages calculation model that tied to the class's theory of liability

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211 *See id.*

212 *Comcast*, 133 S. Ct. at 1436 (Ginsburg, J., dissenting).

213 *See id.*

214 *Id.*

215 *Id.* at 1437.

216 *See id.* ("The Court's ruling is good for this day and case only.").

217 Barton, *supra* note 174.

218 *See id.*

219 *See id.*

220 *See id.*; Jessie Kokrda Kamens, *Moldy Washer Class Certification Reaffirmed After* Comcast, Amgen *Applied*, 14 CLASS ACTION LITIG. REP. (BNA) NO. 822 (July 26, 2013); Colin E. Flora, *6th Circuit Reaffirms Class Certification in* Whirlpool II, HOOSIER LITIG. BLOG (July 26, 2013), http://www.pavlacklawfirm.com/blog/2013/07/26/6th-circuit-reaffirms-class-certification-132134; Mark Johnson & Rand L. McClellan, *Sixth Circuit Reaffirms Certification of Defective Washing Machine Class After Remand Instruction by the Supreme Court*, BAKERHOSTETLER (July 23, 2013), http://www.bakerlaw.com/alerts/sixth-circuit-reaffirms-certification-of-defective-washing-machine-class-after-remand-instructions-by-the-supreme-court-7-23-2013/; Mendelsohn, *supra* note 160.

and applied to the entire class.[221] Those with this view suggest that future classes be prepared to explicitly demonstrate that damages can be calculated on a class-wide basis with a model that is specifically related to the class's liability theory.[222] Others take a more limited view of the *Comcast* holding, seeing it as a traditional predominance definition that denies certification if it is clear that "individual damage calculations will inevitably overwhelm questions common to the class."[223] Proponents of this view point to the history of class action cases that would have been wrongly decided.[224]

Some plaintiff classes have responded to *Comcast* by seeking certification as liability-only classes to avoid demonstrating class-wide damages models.[225] In response, defendant companies have adopted a broad reading of *Comcast*, claiming that the decision should be applied to all classes under Rule 23(b)(3), including liability-only classes.[226] Under that interpretation, a liability-only class would never pass the certification stage because by seeking certification as a liability-only class, the class has already conceded that damages are too varied to be part of the class action.[227] For the most part, however, courts seem unified against defendant companies on this point, as they have allowed liability-only classes to proceed through certification in light of the *Comcast* decision.[228]

3. The Liability-Only Distinction

Although the *Comcast* dissent cautioned that the majority holding was not meant for future application, one set of plaintiffs felt its effects nearly immediately in *Glazer v. Whirlpool Corp*.[229] The Sixth Circuit faced a grant, vacate, and remand by the Supreme Court in which the Court briefly and directly wrote, "Judgment vacated, and case remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Comcast Corp. v. Behrend*."[230] On remand, the Sixth Circuit affirmed certi-

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221 *See* Barton, *supra* note 174.

222 *See id*. ("[B]e prepared to explain how and why a damages calculation can be calculated on a class-wide basis."); Mendelsohn, *supra* note 160.

223 Johnson & McClellan, *supra* note 220 (quoting Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433 (2013)) (internal quotation mrks omitted).

224 *See* Kamens, *supra* note 220.

225 *Whirlpool II*, 722 F.3d 838, 860 (6th Cir. 2013), *cert. denied sub nom.* Whirlpool Corp. v. Glazer, 134 S. Ct. 1277 (2014); *see* Butler v. Sears, Roebuck & Co., 727 F.3d 796, 800 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); *see also* Mendelsohn, *supra* note 160.

226 Barton, *supra* note 174.

227 *See id.*

228 *See id.*

229 *See Whirlpool II*, 722 F.3d at 859-61.

230 Whirlpool Corp. v. Glazer, 133 S. Ct. 1722, 1722 (2013) (mem.).

fication of a liability-only class for a second time, now in light of the elevated requirement set forth in the *Comcast* holding.[231]

The early stages of the liability-only class in *Whirlpool* began in the mid-2000s, when two Ohio residents found mold growing inside of their front-loading Whirlpool washing machines.[232] One of the residents purchased a Whirlpool Duet HT model in 2005, and the other purchased a Whirlpool Duet Sport in 2006.[233] The Ohio residents used different detergent types and amounts.[234] However, after six to eight months, both of the Ohio residents noticed moldy odors emanating from the washing machines and laundry.[235] After further inspection, both residents found mold growing, but the mold was in different parts of the two washing machines.[236] The residents complained to Whirlpool representatives and received different remedy advice.[237] None of the offered solutions worked, and the mold in both washing machines persisted.[238]

Whirlpool began manufacturing Duet-style washing machines in 2002.[239] All Duet models are built on two nearly identical platforms that include a front-loading entrance.[240] Whirlpool was aware that front-loading washing machines—and the Duet models in particular—caused mold.[241] With mold complaints increasing, Whirlpool generated multiple cleaning tactics to solve the mold problem, including the failed methods prescribed to the two Ohio residents.[242]

At the District Court, the Ohio residents conceded, and the court agreed, that damages were varied and not common to the class, therefore, likely requiring individual proof.[243] The court certified the class as liability-only and the Sixth Circuit affirmed.[244] The Sixth Circuit agreed that damages being addressed individually at a later time did not overcome the pre-

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231 *See Whirlpool II*, 722 F.3d at 860.

232 *Id.* at 846.

233 *Id.*

234 *Id.*

235 *Id.*

236 *Id.*

237 *Whirlpool II*, 722 F.3d at 846-47.

238 *Id.*

239 *Id.* at 846.

240 *Id.* at 847.

241 *Id.* at 847-48.

242 *Id.* at 846, 848-49.

243 *See In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., No. 1:08-WP-65000, 2010 U.S. Dist. LEXIS 69254, at *9 (N.D. Ohio July 12, 2010), *aff'd*, 678 F.3d 409 (6th Cir. 2012), *vacated sub nom.* Whirlpool Corp. v. Glazer, 133 S. Ct. 1722 (2013) (mem.), *remanded sub nom. Whirlpool II*, 722 F.3d 838 (6th Cir. 2013).

244 *See In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 678 F.3d 409, 412 (6th Cir. 2012), *vacated sub nom.* Whirlpool Corp. v. Glazer, 133 S. Ct. 1722 (2013) (mem.).

dominating liability issue.[245] Whirlpool petitioned the Supreme Court to review the class certification.[246]

The Sixth Circuit met the liability-only class for a second time, on remand by the Supreme Court, to reconsider the certification in light of the Supreme Court's recent *Comcast* decision.[247] Once again, the Sixth Circuit affirmed the liability-only class's certification.[248] The Sixth Circuit relied on the District Court's determination that the class's claims turned on Whirlpool's liability and whether that liability could be determined with evidence common to the class.[249] The plaintiffs' counsel persuaded the Sixth Circuit by pointing out that all the class members owned the same design of washing machine, which contained a defect that causes mold, even if not every member had seen the mold yet.[250]

Finally, in the last three pages of its twenty-three page decision, the Sixth Circuit addressed the Supreme Court's specific direction to reconsider the class certification in light of *Comcast*.[251] To begin, the Sixth Circuit concluded that *Comcast* did not change the predominance analysis for a short and simple reason: the *Comcast* class sought certification as a liability-and-damages class while the *Whirlpool* class sought certification as a liability-only class.[252] Based on this distinction, the Sixth Circuit held that *Comcast* did not change the certification outcome and, therefore, affirmed the liability-only class's certification for a second time.[253]

The Sixth Circuit is not the only circuit that accepts liability-only classes for certification. In fact, at least four other circuits have explicitly allowed liability-only classes like the class in *Whirlpool*.[254] Furthermore, there is at least one court in each circuit that has held that the predominance requirement can be satisfied despite individualized damage issues.[255]

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245 *See id.* at 420-21.

246 *Glazer*, 133 S. Ct. at 1722.

247 *Whirlpool II*, 722 F.3d at 845.

248 *Id.*

249 *See id.* at 853.

250 *See id.* at 856.

251 *Id.* at 859-61.

252 *Id.* at 860.

253 *Whirlpool II*, 722 F.3d at 861.

254 *See* Butler v. Sears, Roebuck & Co., 727 F.3d 796, 801 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); *In re* New Motor Vehicles Can. Exp. Antitrust Litig., 522 F.3d 6, 28 (1st Cir. 2008); Chiang v. Veneman, 385 F.3d 256, 273 (3d Cir. 2004); *In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 139, 141 (2d Cir. 2001).

255 *See* Yokoyama v. Midland Nat'l Life Ins. Co., 594 F.3d 1087, 1094 (9th Cir. 2010); DG ex rel. Stricklin v. Devaughn, 594 F.3d 1188, 1195 (10th Cir. 2010); Arreola v. Godinez, 546 F.3d 788, 801 (7th Cir. 2008); Beattie v. CenturyTel, Inc., 511 F.3d 554, 564 (6th Cir. 2007); Tardiff v. Knox Cnty., 365 F.3d 1, 6 (1st Cir. 2004); *Chiang*, 385 F.3d at 273; Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 427-28 (4th Cir. 2003); Allapattah Servs., Inc. v. Exxon Corp., 333 F.3d 1248, 1261 (11th Cir. 2003); *Visa Check/MasterMoney*, 280 F.3d at 139; Bertulli v. Indep. Ass'n of Cont'l Pilots, 242 F.3d

The Seventh Circuit joined the Sixth Circuit in *Butler v. Sears, Roebuck & Co.*,[256] which also regarded a class of owners of defective washing machines.[257] Similar to the Sixth Circuit in *Whirlpool*, the Seventh Circuit differentiated *Sears* from *Comcast* by pointing out that the class in *Sears* sought liability-only, instead of liability-and-damages like the class in *Comcast*.[258] The Seventh Circuit reasoned that if it did not allow the liability-only class to be certified, the defendant would have escaped answering for its defective products since class members likely do not have the economic incentive to individually bring suits.[259]

The U.S. District Court for the Southern District of New York provided an in-depth analysis of *Comcast*'s effects on liability-only classes in *Jacob v. Duane Reade, Inc.*[260] The court certified the class regarding liability and decertified the class regarding damages, making the class into liability-only.[261] The court explicitly permitted Rule 23(b)(3) liability-only classes under Rule 23(c)(4), holding that classes could limit themselves to liability-only when damages require individual proof, but liability determinations are class wide.[262] The court stated that liability-only classes were not a catch-all whenever a class wanted to avoid the *Comcast* holding, but instead a useful tool in case management.[263]

4. Liability-Only Classes Seem Inconsistent with *Comcast*

In *Comcast*, the Supreme Court explicitly held that "under the proper standard for evaluating certification, respondents' model falls far short of establishing that damages are capable of measurement on a classwide ba-

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290, 298 (5th Cir. 2001); Alpern v. UtiliCorp United, Inc., 84 F.3d 1525, 1540 (8th Cir. 1996); McCarthy v. Kleindienst, 741 F.2d 1406, 1415 (D.C. Cir. 1984).

256 727 F.3d 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014).

257 *Id.* at 797.

258 *Id.* at 800.

259 *Id.* at 801.

260 293 F.R.D. 578, 581-82 (S.D.N.Y. Aug. 8, 2013) (explaining the current state of post-*Comcast* decisions and providing a break-down of the decisions into three categories: (1) courts that approve certification because the class meets the *Comcast* requirement by demonstrating a class-wide damage model related to the liability theory; (2) courts that deny certification for a liability-and-damages class that cannot create a class-wide damage model; and (3) courts that certify classes as liability-only in accordance with Rule 23(c)(4)); *id.* at 593 (determining that this case fell into the third category).

261 *Id.* at 593, 595.

262 *Id.* at 589 ("Rule 23(c)(4) cannot cure every ill that troubles a putative class. It can, however, serve as a useful and fair case management tool where (1) damages track liability in the manner contemplated by *Comcast*; (2) Rules 23(a) and (b) are satisfied as to common issues; and (3) individualized issues of proof predominate over a discrete, uncommon issue, such as damages, and due process impels that a defendant have the opportunity to respond to such individual positions.").

263 *Id.*

sis."[264] On first glance, this appears to be a heightened predominance requirement that requires classes seeking certification under Rule 23(b)(3) to show a damages-calculation model that can apply to the entire class. This is a far leap from the Supreme Court's previous widely accepted understanding in *Amchem* that predominance tests "whether proposed classes are sufficiently cohesive to warrant adjudication by representation."[265] Instead, the *Comcast* Court asked for much more than a demonstration of cohesion by specifically singling out the damages component of class certification.[266]

If courts were to interpret the *Comcast* holding to require a class-wide model to calculate damages, then *Comcast* would clash with *Whirlpool*. In *Whirlpool*, the class outright conceded that damages were varied across the class and did not attempt to contend that a class-wide damages model existed.[267] Without a class-wide damages model, the class in *Whirlpool* could not possibly meet the heightened *Comcast* requirement.[268] If *Comcast* conflicts with *Whirlpool*, then *Sears* and *Duane Reade* were also wrongly decided. Therefore, under this interpretation of *Comcast*, class certification should have been denied in *Whirlpool*, *Sears*, and *Duane Reade*, making it seem like liability-only class certification is no longer an option for classes that have varied damages and cannot satisfy the heightened predominance requirement.

IV. LIABILITY ONLY, PLEASE: GIVE THE COURT WHAT IT REALLY WANTS

While liability-only classes seem inconsistent with *Comcast*, courts are clearly still willing to certify liability-only classes after the *Comcast* decision.[269] This raises the question—what did the Supreme Court really intend to result from its *Comcast* decision? Responding courts would likely say that the Court did not intend to eliminate liability-only class certification and that the *Comcast* holding only applies to liability-and-damages classes, like the class in *Comcast*. This Part demonstrates why courts have been correct in upholding liability-only class certification in light of *Comcast*. Section A explains that a strict reading of *Comcast* barring liability-only

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264 Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433 (2013).

265 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997).

266 *See Comcast*, 133 S. Ct. at 1433.

267 *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., No. 1:08-WP-65000, 2010 U.S. Dist. LEXIS 69254, at *9 (N.D. Ohio. July 12, 2010), *aff'd*, 678 F.3d 409 (6th Cir. 2012), *vacated sub nom.* Whirlpool Corp. v. Glazer, 133 S. Ct. 1722 (2013) (mem.).

268 *See* Joseph Krebs, Note, Comcast v. Behrend*: The Class Action Channel Is Still Scrambled*, 16 DUQ. BUS. L.J. 83, 101 (2013).

269 *See Whirlpool II*, 722 F.3d 838, 861 (6th Cir. 2013), *cert. denied sub nom.* Whirlpool Corp. v. Glazer, 134 S. Ct. 1277 (2014); Butler v. Sears, Roebuck & Co., 727 F.3d 796, 798 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); Jacob v. Duane Reade, Inc., 293 F.R.D. 578, 595 (S.D.N.Y. 2013).

classes is inconsistent with the foundational values of class action suits—efficiency and fairness—that are in place for small-claims classes, like the liability-only class in *Whirlpool*. Section B then debunks the majority's holding in *Comcast* and proposes a new explanation of what the majority truly intended for class actions. It seems likely that the Court was not barring liability-only classes at all, but was actually pushing parties to seek certification as liability-only instead of liability-and-damages. If this is so, then the *Comcast* Court triggered a complete overhaul of class certification, which Section C explains. Under this Comment's proposed interpretation of the *Comcast* holding, seeking certification as a liability-only class will—and should—become the new norm, prevailing over the traditional liability-and-damages method.

A. *The Supreme Court Did Not Intend to Create Remedy-Less Plaintiffs*

Liability-only classes are sometimes comprised of small-claims plaintiffs, like in *Whirlpool*, *Sears*, and *Duane Reade*.[270] If *Comcast* is interpreted to always require a class-wide damages calculation model in class action suits and therefore bar liability-only classes, then the Supreme Court also eroded small-claims classes' ability to bring suits as liability-only classes.[271] If the *Comcast* holding bars small-claims classes seeking liability-only certification, then those small-claims class members would likely never see justice.[272] For example, the *Whirlpool* and *Sears* classes of people with defective washing machines would not have been able to receive compensation for their varying harms from the defective washing machines,[273] and the *Duane Reade* class of assistant store managers would not have been able to receive their varied amounts of overtime pay.[274] Small-claims plaintiffs lack economic incentive to bring individual cases, because the compensation sought does not outweigh the costs of litigation.[275] However, a lack of economic incentive should not suggest a lack of judicial demand.

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270 *See Whirlpool II*, 722 F.3d at 849-50 (involving a class of owners of defective washing machines); *Sears*, 727 F.3d at 798 (involving a class of owners of defective washing machines for both mold and control units); *Duane Reade*, 293 F.R.D. at 580 (involving a class of assistant store managers seeking overtime pay).

271 *See* Bone, *supra* note 28, at 1113-14

272 *See* 1 RUBENSTEIN ET AL., *supra* note 19, § 1:3, at 8-9; Bone, *supra* note 28, at 1102-03; Dam, *supra* note 47, at 49.

273 *See Whirlpool II*, 722 F.3d at 849-50; *Sears*, 727 F.3d at 798.

274 *See Duane Reade*, 293 F.R.D. at 580.

275 *See* 1 RUBENSTEIN ET AL., *supra* note 19, § 1:3, at 8-9; Bone, *supra* note 28, at 1102-03; Dam, *supra* note 47, at 49.

Before courts began raising the bar to achieve class certification in favor of defendants,[276] small-claims plaintiffs were a key focus of the 1966 overhaul of Rule 23.[277] Class actions offered small-claims plaintiffs an opportunity to join together to share litigation costs and seek justice.[278] Class actions promoted short-term efficiency for small-claims classes by providing a way for courts to handle multiple identical small-claims at once.[279] Class actions also provided long-term efficiency for small-claims classes by facilitating an economic incentive that allowed a class to sue a wrongdoing defendant, which in turn deterred defendants' future bad behavior and protects future individuals from becoming small-claims plaintiffs.[280] Without the class action tool, small-claims plaintiffs would lack incentive to bring suit and often be left remedy-less, and defendants would lack incentive for good behavior.[281]

Reading and interpreting the *Comcast* holding in the historical and foundational light of class actions, it is difficult to imagine that the Supreme Court would want to take away the class action tool for small-claims plaintiffs seeking certification under Rule 23(b)(3) as liability-only classes. Interpreting *Comcast* to require all classes to provide a precise and comprehensive class-wide damages calculation model would create remedy-less plaintiffs in liability-only classes, since those plaintiffs concede that damages cannot be demonstrated as a class. Both district and circuit courts have recognized and avoided this undesirable outcome by distinguishing liability-only classes from the liability-and-damages class in *Comcast*, so that liability-only classes are not subject to a stricter and unattainable predominance requirement.[282] Based on foundational values of class actions and court reactions to *Comcast*, it is likely that the Supreme Court did not intend to bar liability-only classes at all, and instead intended the opposite—to encourage liability-only classes in place of liability-and-damages classes.

This historical support in favor of liability-only class certification in light of the *Comcast* decision is met with some current industry opposition. Industry practitioners view the liability-only strategy as a "powerful weapon" for classes to take advantage of varied damages across the class.[283] Op-

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276 *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628-29 (1997); Lathrop, *supra* note 162.

277 *Amchem*, 521 U.S. at 617 (citing Kaplan, *supra* note 116, at 497); *see also* 1 RUBENSTEIN ET AL., *supra* note 19, § 1:3, at 5-6; Bone, *supra* note 28, at 1103-04.

278 1 RUBENSTEIN ET AL., *supra* note 19, at § 1:3, at 9.

279 *Id.* § 1:9, at 26-27.

280 *Id.* at 26-28; Dam, *supra* note 47, at 49.

281 1 RUBENSTEIN ET AL., *supra* note 19, § 1:3, at 8-9; Bone, *supra* note 28, at 1102-03; Dam, *supra* note 47, at 49.

282 *See Whirlpool II*, 722 F.3d 838, 860-61 (6th Cir. 2013), *cert. denied sub nom.* Whirlpool Corp. v. Glazer, 134 S. Ct. 1277 (2014); Butler v. Sears, Roebuck & Co., 727 F.3d 796, 799-800 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); Jacob v. Duane Reade, Inc., 293 F.R.D. 578, 581-82 (S.D.N.Y. 2013).

283 Johnson & McClellan, *supra* note 220.

ponents of classes using liability-only certification in light of *Comcast* see the strategy as an impermissible alternative that does not align with Rule 23(b)(3)'s specifically heightened requirements or with recent trends in courts to make certification more difficult to achieve.[284] While it may be true that liability-only certification is a powerful tool that does not directly align with recent class action trends that favor defendants, it does not—and should not—follow that the Court did not intend a change for class actions.

B. Comcast*'s True Holding—The Supreme Court's New Order for Class Actions*

Although the *Comcast* Court created a new rule that makes the predominance requirement more difficult to achieve,[285] the Court's holding should not be interpreted as applying to liability-and-damages classes, as well as liability-only classes. Instead, the *Comcast* holding should be read narrowly to only apply to liability-and-damages classes, as district and circuit courts have already held.[286] Under a narrow reading of *Comcast* as applying exclusively to liability-and-damages classes, *Comcast* can co-exist with liability-only classes.

Throughout the entire majority opinion in *Comcast*, the Court never addressed whether its holding applied to all classes under Rule 23(b)(3) or only liability-and-damages classes.[287] This omission has opened up interpretation to take two potential opposing views: (1) the *Comcast* holding should be applied narrowly only to liability-and-damages classes;[288] or (2) the *Comcast* holding should be applied broadly to all classes, including liability-only classes.[289] This Comment proposes the former approach—*Comcast* should be interpreted narrowly, so that liability-only classes are still achievable.

Rule 23(c)(4) explicitly addresses liability-only classes, and the Fifth Circuit directly addressed liability-only certification in the 1990s.[290] Since liability-only classes were not foreign to courts at the time of the *Comcast*

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284 *See* Kamens, *supra* note 220.

285 *See* Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433, 1435 (2013).

286 *Whirlpool II*, 722 F.3d at 860; *Sears*, 727 F.3d at 799-800; *Duane Reade*, 293 F.R.D. at 581-82, 595.

287 *Comcast*, 133 S. Ct. at 1430-35.

288 *See id.* at 1437 (Ginsburg, J., dissenting) ("The Court's ruling is good for this day and case only."); *see also* Johnson & McClellan, *supra* note 220.

289 *See* Barton, *supra* note 174; *see also* Mendelsohn, *supra* note 160.

290 FED. R. CIV. P. 23(c)(4) ("When appropriate, an action may be brought or maintained as a class action with respect to particular issues."); *see* Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996).

decision and had been addressed by courts before,[291] the Supreme Court must have been aware of liability-only classes' existence. Since liability-only classes eliminate the damages component of the Rule 23(b)(3) certification process,[292] the Supreme Court could likely foresee that relying on Rule 23(c)(4) to avoid the higher predominance bar could become a popular route for classes to follow after *Comcast*. In support of a narrow interpretation, the dissent directly addressed the majority holding's applicability by urging that the holding only be applicable to the facts and circumstances of *Comcast*.[293] Similarly, courts interpreting *Comcast* have narrowed the holding to apply to liability-and-damages classes, but not liability-only classes.[294]

Since the Supreme Court was aware of liability-only classes, it is likely that the Court made a deliberate omission when it chose not to address the effects of the stricter predominance requirement on liability-only classes. The Court acted strategically by making three distinct moves in the *Comcast* decision: (1) it rewrote the question presented, thereby reframing the case;[295] (2) it raised the predominance bar in a liability-and-damages class certification decision;[296] and (3) it did not address whether the raised predominance bar also applied to liability-only classes, which would seem to be a conscious decision.[297] Those three distinct acts should be interpreted to signal that the Court had something it wanted to address and used *Comcast* as a vehicle to relay its desired holding. In particular, the Court made an extremely strict predominance holding to make it more difficult to achieve class certification as a liability-and-damages class.[298] Then, the Court deliberately failed to apply the holding to liability-only classes so that liability-only class certification would be available to Rule 23(b)(3) classes under far less demanding predominance requirements, making liability-only class certification a more attainable and attractive option for classes.[299]

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291 *In re* Nassau Cnty. Strip Search Cases, 461 F.3d 219, 226-27 (2d Cir. 2006); *Castano*, 84 F.3d at 745 n.21.

292 *See* Comcast v. Behrend*: Has It Made an Impact?*, *supra* note 12, at 1, 3.

293 *Comcast*, 133 S. Ct. at 1437 (Ginsburg, J., dissenting).

294 *Whirlpool II*, 722 F.3d 838, 860 (6th Cir. 2013), *cert. denied sub nom.* Whirlpool Corp. v. Glazer, 134 S. Ct. 1277 (2014); Butler v. Sears, Roebuck & Co., 727 F.3d 796, 799 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); Jacob v. Duane Reade, Inc., 293 F.R.D. 578, 581-82, 595 (S.D.N.Y. 2013).

295 *Comcast*, 133 S. Ct. at 1435 (Ginsburg, J., dissenting) ("Comcast sought review of the following question: '[W]hether a district court may certify a class action without resolving 'merits arguments' that bear on [Federal Rule of Civil Procedure] 23's prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3).'" (alterations in original) (quoting another source)).

296 *See id.* at 1433 (majority opinion).

297 *See id.* at 1432-34.

298 Lathrop, *supra* note 162.

299 *Whirlpool II*, 722 F.3d at 859-60.

By distinguishing between liability-and-damages classes and liability-only classes, two distinct subcategories of classes arise under Rule 23(b)(3): liability-and-damages classes and liability-only classes. Under the narrow interpretation of *Comcast*, liability-and-damages classes are held to a more rigorous predominance requirement to show that damages can be calculated on a class-wide basis.[300] Liability-only classes, however, should not be held to the stricter predominance requirement of *Comcast*, and instead must only meet the pre-*Comcast* predominance requirement that common issues outweigh any individual issues and demonstrate cohesiveness.[301] Under this interpretation, class certification under Rule 23(b)(3) as a liability-only class becomes easier to achieve than as a liability-and-damages class. When faced with an easier or more difficult path towards class certification, parties are more likely to choose the easier path. As a result, a post-*Comcast* class is more likely to seek certification under Rule 23(b)(3) as a liability-only class instead of a more traditional liability-and-damages class. After all, there is no clear reason for a plaintiff class to pick a class certification method that is more difficult to satisfy when an easier option is readily available.

By making it more difficult for liability-and-damages classes to be certified, and by not explicitly applying the stricter predominance standard to liability-only classes, the Supreme Court made a deliberate omission in *Comcast*, meant to encourage classes to seek liability-only certification instead of the traditional liability-and damages-certification. Interpreting the *Comcast* holding this way reconfigures the norm in class certification to transition from liability-and-damages classes to liability-only classes. Although the Supreme Court may have taken an indirect route to communicate this holding, it is likely that the Court did not simply say what it meant for a reason. The Supreme Court does not have unrestricted authority to re-write the FRCP, but can effect slight change through its holdings.[302] Additionally, it is likely that the Supreme Court did not want to explicitly rule against almost fifty years of class action jurisprudence that establishes liability-and-damages classes as the norm in Rule 23(b)(3) class certification.[303] When *Comcast* is interpreted in light of this information, it becomes extremely plausible and almost clear that the Court was making a strategic and meaningful move to indirectly change Rule 23(b)(3) class certifications.

Reading the Supreme Court's indirect *Comcast* holding to encourage classes to seek certification under Rule 23(b)(3) as liability-only classes instead of liability-and-damages classes is not only plausible, but also sup-

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300 *Comcast*, 133 S. Ct. at 1433.

301 FED. R. CIV. P. 23(b)(3); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623-24 (1997).

302 *See* 28 U.S.C. §§ 2072-2074 (2012). The Rules Enabling Act allows the Supreme Court to prescribe general rules of procedure, but the Court may not use the Federal Rules of Civil Procedure to "abridge, enlarge or modify any substantive right." *Id.* § 2072.

303 *See Amchem*, 521 U.S. at 628-29; Bone, *supra* note 28, at 1105; Lathrop, *supra* note 162.

ported by current issues in class certification. Over time, the liability-and-damages norm has become inefficient as settlement becomes more common, as Subsection 1 discusses. Subsection 2 explains how liability-only classes better achieve foundational class action values.

1. The Predominance Requirement Has Become Inefficient

When addressing certification for a liability-and-damages class under Rule 23(b)(3), courts must look into the merits of the class's alleged damages by analyzing a proposed damages calculation model.[304] Courts cannot simply put a check mark in a box saying that damages exist; instead, they have to conduct a rigorous analysis to ensure that the class achieves cohesiveness in their issues[305]—and now, under *Comcast*, that the proposed damage model is both directly tied to the class's theory of liability and applicable to the entire class.[306] This process involves numbers, calculations, and additional work unrelated to legal questions such as liability. Even still, the predominance requirement under Rule 23(b)(3) has developed to require courts to look into such merits, turning judges into accountants.[307] For both courts and parties, including damages in the certification process adds additional time to the process. The court has to oversee two issues: liability and damages. The preliminary damages evaluation is an added step that can drag out certification to be much longer than if the court only dealt with liability.[308]

All of this extra time, work, and money, however, have become academic in the current state of class actions, which almost always result in settlements.[309] The majority of class actions result in settlement once the court grants class certification,[310] which removes the court from the damages determination process. Settlement allows the parties to negotiate damages outside of the court. It is likely that the parties would not use the damages-calculation model during settlement that they proposed during class certification. Instead, the parties will likely negotiate and settle on a different amount because the point of settling is to reduce potential costs. As such, the court's preliminary consideration of damages loses meaning in a practical sense—it is merely wasted time and energy for all involved. The Court

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304 *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551-52 & n.6 (2011).

305 *See id.*; *Amchem*, 521 U.S. at 628.

306 Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433 (2013).

307 *See* FED R. CIV. P. 23(b)(3); *Wal-Mart*, 131 S. Ct. at 2551-52 & n.6.

308 *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., No. 1:08-WP-65000, 2010 U.S. Dist. LEXIS 69254, at *9 (N.D. Ohio July 12, 2010), *aff'd*, 678 F.3d 409 (6th Cir. 2012), *vacated sub nom.* Whirlpool Corp. v. Glazer, 133 S. Ct. 1722 (2013) (mem.) (demonstrating that a case revolving around damages calculation model issues may last multiple years).

309 Klonoff, *supra* note 29, at 737.

310 *See id.*

very well might have taken *Comcast* as an opportunity to push class action practices in a more efficient direction.

2. Liability-Only Classes Achieve Efficiency and Fairness for All

Liability-only classes improve the inefficiencies of liability-and-damages classes by eliminating an inefficient element—damages.[311] By selecting to seek certification as a liability-only class, a class is removing the damages analysis for both the parties and the courts.[312] Parties do not have to waste resources hiring accountants and specialists to generate calculation models, and courts do not have to waste time analyzing the merits of a damages calculation model that will likely not even be used. Instead, when addressing certification for a liability-only class, courts can focus on what courts are meant to focus on—legal questions, such as liability.

Liability-only classes also save time for both courts and parties because courts only have to manage one issue.[313] In the short term, parties can proceed to the next steps of their suits, whether that be trial or settlement. In the long term, courts will be more available to address other cases, which benefits the public. By allowing courts to maximize their strengths and by eliminating unnecessary resources invested into certification-related damages models, liability-only classes promote efficiency for class certification under Rule 23(b)(3).

Liability-only classes also promote fairness. Small-claims classes that have varied damages but a clear source of liability, like the group of owners of defective washing machines in *Whirlpool*, have the ability to seek justice as a liability-only class under Rule 23(b)(3).[314] This result would uphold the Advisory Committee's focus on small-claims plaintiffs when it enacted the 1966 amendments to Rule 23(b)(3).[315] Recent trends demonstrate that courts became frustrated with the state of class actions and continuously raised the predominance bar, making certification difficult to achieve and, in some circumstances, impossible for classes deserving justice.[316] The Supreme

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311 *See Issue Certification Under Rule 23(c)(4) in a Post*-Wal-Mart *World*, *supra* note 150, at 2.

312 *See id.*

313 *See* FED. R. CIV. P. 23(c)(4) ("When appropriate, an action may be brought or maintained as a class action with respect to particular issues."); *see also Issue Certification Under Rule 23(c)(4) in a Post*-Wal-Mart *World*, *supra* note 150, at 2.

314 *Whirlpool II*, 722 F.3d 838, 850-51 (6th Cir. 2013), *cert. denied sub nom.* Whirlpool Corp. v. Glazer, 134 S. Ct. 1277 (2014).

315 *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (citing Kaplan, *supra* note 116, at 497); *see also* 1 RUBENSTEIN ET AL., *supra* note 19, § 1:3, at 6-10.

316 *See* Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433 (2013); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011); *Amchem*, 521 U.S. at 628-29; *see also* Bone, *supra* note 28, at 1105-06; Lathrop, *supra* note 162.

Court's indirect recognition of liability-only classes as the superior certification method under Rule 23(b)(3) redirects the focus of class actions on plaintiff classes in need of justice.

CONCLUSION

Although the liability-and-damages class method has been the norm for classes seeking certification under Rule 23(b)(3), practical and historical evidence shows that liability-only classes should be the new norm. Based on efficiency and fairness, courts and parties no longer want or need to address the issue of damages during class certification under Rule 23(b)(3)'s predominance requirement. As a result, class certifications under Rule 23(b)(3) will likely begin to look much differently.

The Supreme Court's majority holding in *Comcast* created a higher predominance standard for classes seeking certification under Rule 23(b)(3).[317] While addressing a certification issue for a liability-and-damages class, the Court explicitly held that a class seeking certification under Rule 23(b)(3) must show that damages can be calculated on a class-wide basis, but was silent on whether the new rule applied to liability-only classes as well.[318] Since a broad interpretation of the *Comcast* holding would bar small-claims classes seeking certification as liability-only classes, the *Comcast* holding should be interpreted narrowly to only apply to liability-and-damages classes. Under *Comcast*, the traditional liability-and-damages classes will have to present a class-wide damage calculation model that is directly tied to the class's theory of liability. Rule 23(b)(3) classes also have an alternative method—liability-only. Since the stricter predominance holding from *Comcast* only applies to liability-and-damages classes, liability-only classes have a lower bar to clear to achieve certification.

By making it more difficult to achieve predominance and certification under Rule 23(b)(3) as a liability-and-damages class than as a liability-only class, the Supreme Court's *Comcast* decision indirectly urges classes to seek certification under Rule 23(b)(3) as liability-only classes, instead of as liability-and-damages classes. The *Comcast* case appears to be a vehicle to reconfigure the current Rule 23(b)(3) class action quandary that courts, parties, and the Advisory Committee have created when building and interpreting the predominance requirement. Instead of focusing on numbers and models that are rarely used, courts will be able to focus on legal issues, like liability.

As more parties and courts respond to the *Comcast* decision, the norm will likely continue to shift away from the traditional liability-and-damages class to a new paradigm—liability-only classes. This shift in Rule 23(b)(3)

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317 *See Comcast*, 133 S. Ct. at 1433.

318 *See id.*

class actions is supported by the origins of the 1966 Advisory Committee, which created Rule 23(b)(3) with small-claims plaintiffs in mind,[319] as well as by the foundational values of class actions—efficiency and fairness.[320]

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319 *Amchem*, 521 U.S. at 617 (citing Kaplan, *supra* note 116, at 497); *see also* 1 RUBENSTEIN ET AL., *supra* note 19, § 1:3, at 6-9.

320 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 402 (2010).