

From Comcast to Boeing: The Evolving Standard for Classwide Damages in Securities Class Actions

At class certification, plaintiffs must show that damages are capable of measurement on a class-wide basis using a common methodology that is consistent with their theory of liability.

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The standard for proving that damages can be calculated on a classwide basis in securities actions continues to evolve. In recent years, courts have increasingly required plaintiffs to do more than simply defer damages issues to later stages of the case. Instead, at class certification, plaintiffs must show that damages are capable of measurement on a class-wide basis using a common methodology that is consistent with their theory of liability.

Comcast and the Common Damages Model

The U.S. Supreme Court's 2013 decision in *Comcast v. Behrend* is the touchstone for how courts must evaluate classwide damages under Rule 23(b)(3), including in federal securities class action cases. In *Comcast*, the plaintiffs alleged that Comcast implemented a "clustering" strategy by concentrating its cable operations in particular geographic regions and swapping systems outside those regions with competitors in order to enhance market power and charge supra-competitive prices in violation of antitrust laws. The district court certified the class, and the U.S. Court of Appeals for the Third Circuit affirmed. On appeal, Comcast argued that the plaintiffs' damages model was flawed because it failed to isolate the impact of the single theory of antitrust injury that remained in the case from the impacts of other alleged anticompetitive conduct. The Third Circuit treated this challenge as going to the merits and therefore outside the scope of the class certification inquiry.

The Supreme Court reversed. It held that the class was improperly certified because the plaintiffs' damages model did not establish that damages were capable of class-wide measurement in a way that aligned with the surviving theory of liability. Plaintiffs constructed a "but-for" baseline for damages—a hypothetical benchmark reflecting what competitive prices would have been absent any antitrust violation—and then calculated damages by comparing that baseline to the actual prices Comcast charged. On its face, this appeared to be a standard, classwide methodology. But the model did not isolate the price effects attributable to other alleged conduct.

Thus, the Supreme Court concluded that individualized questions about why any given subscriber allegedly overpaid would predominate over the common ones and that the plaintiffs therefore failed to satisfy Rule

23(b)(3)'s predominance requirement. Comcast made clear that courts should apply a "rigorous analysis" when determining whether plaintiffs have satisfied Rule 23(b)(3)'s predominance requirement. That analysis, the court explained, extends beyond whether questions of liability can be resolved with common proof. It also requires examining whether damages are measurable on a class-wide basis using a methodology that aligns with the plaintiffs' theory of liability.

Comcast's Implications for Securities Class Actions

Although Comcast arose in the antitrust context, its holding has important implications for securities class actions. To bring a claim under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, a plaintiff ordinarily must prove individualized reliance on the alleged misrepresentation. In the class action context, that individual reliance requirement would typically defeat predominance. The Supreme Court in *Basic v. Levinson*, however, created a rebuttable fraud-on-the-market presumption of reliance. Under *Basic*, if a security trades in an efficient market, courts presume that the market price reflects all publicly available information, including any misrepresentations. Investors are presumed to rely on the integrity of the market price when they buy or sell securities, and thus are presumed to have relied on any misrepresentation that affected that price.

This presumption allows reliance to be established on a classwide basis. However, the defendants may rebut it and defeat class certification by demonstrating that the alleged misrepresentation had no impact on the security's price through a preponderance of the evidence. While *Basic* supplies a common mechanism for proving reliance, Comcast polices the fit between the theory of liability and the damages methodology. In securities class actions, these concepts typically intersect through questions of price impact.

The Supreme Court's decision in *Goldman Sachs Group v. Arkansas Teacher Retirement System* illustrates how price impact and the *Basic* presumption interact with class certification and classwide damages. There, the plaintiffs alleged that Goldman maintained an artificially inflated stock price by falsely touting its ability to manage conflicts. At class certification, the plaintiffs invoked the *Basic* presumption. Goldman sought to rebut that presumption by offering evidence that the alleged statements had no impact on its stock price.

The district court held that Goldman had not shown a lack of price impact and certified the class. The Second Circuit affirmed, holding that the defendant bears the burden of persuasion to show that the alleged misrepresentations had no price impact. The Supreme Court held that when a defendant seeks to "sever the link" between an alleged misrepresentation and the stock price by demonstrating a lack of price impact, the defendant bears the burden of persuasion on that issue. At the same time, the court emphasized that the allocation of the burden is unlikely to make much of a difference. The defendant's burden of persuasion "bites" only in narrow circumstances, such as when the evidence is "in equipoise."

'In re FirstEnergy' and the Need for a Claim-Specific Damages Model

Other circuits have embraced Comcast in the context of a securities class action. An emphasis on Comcast's rigorous analysis requirement appears in *In re FirstEnergy Corporation Securities Litigation*. There, the plaintiffs alleged that FirstEnergy failed to disclose a fraudulent scheme and that this nondisclosure artificially inflated the company's stock price. The plaintiffs asserted claims under both the Securities Act of 1933 and the Securities Exchange Act of 1934. The district court certified the class and, in addressing predominance, discussed plaintiffs'

damages model for their Securities Act claims, which benefit from statutory damages formulas. The court then assumed that the same reasoning applied to the plaintiffs' Exchange Act claims.

On appeal, the Sixth Circuit held that the district court failed to conduct the rigorous Comcast analysis required for the Exchange Act claims. The court emphasized that the Securities Act and the Exchange Act are distinct statutes with different damages frameworks. The Securities Act provides statutory formulas, while the Exchange Act requires proof of loss causation and does not specify a damages formula. As a result, a damages model adequate for Securities Act claims does not necessarily satisfy Comcast for Exchange Act claims. Because the district court did not analyze whether plaintiffs' proposed damages methodology could measure class-wide damages for their Exchange Act claim, the Sixth Circuit remanded for a proper Comcast analysis.

'Boeing': The Fourth Circuit Is Poised to Weigh In

The ongoing litigation in *In re The Boeing Company Securities Litigation* also illustrates how these issues are playing out in other circuits. Following two deadly plane crashes, Boeing's stock price declined, and plaintiffs filed a putative class action alleging that Boeing made false and misleading statements about safety, thereby artificially inflating its stock price.

The district court held that plaintiffs satisfied Comcast by proposing an "out-of-pocket" measure of damages—i.e., the difference between the price investors actually paid and the price they would have paid absent the alleged fraud. The court further held that the plaintiffs were not required to present a detailed damages model at the class certification stage.

Boeing appealed, arguing that Comcast requires more: plaintiffs must present a concrete, classwide methodology for calculating damages that is consistent with their theory of liability. The Fourth Circuit granted interlocutory review and has not yet issued a decision. Its ruling will be an important data point on how far Comcast's "rigorous analysis" requirement extends in securities cases. If the Fourth Circuit adopts Boeing's position and demands detailed damages modeling at the class certification stage, class certification in securities cases could become more challenging, at least in the Fourth Circuit. If, instead, the Fourth Circuit upholds the district court's more flexible approach, plaintiffs will have greater leeway to satisfy Comcast without fully developed damages models early in the litigation.

Takeaways

The Third Circuit decided this issue differently in *San Diego County Employees Retirement Association v. Johnson & Johnson*. In our view, the Sixth Circuit's approach adheres more closely to Comcast's requirements. The Supreme Court is likely to resolve this emerging circuit split in due course. With key appellate decisions still forthcoming, litigants should closely monitor how courts continue to refine and apply *Comcast* in the securities class action context.

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